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No. 12924 *2683*

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United States  
Court of Appeals  
for the Ninth Circuit.

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G. McGUIRE PIERCE,  
Appellant,  
vs.

LINCOLN MINING COMPANY, INC., a Corporation, Debtor,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Nevada.



No. 12924

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United States  
Court of Appeals  
for the Ninth Circuit.

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G. McGUIRE PIERCE,

Appellant,

vs.

LINCOLN MINING COMPANY, INC., a Corpo-  
ration, Debtor,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Nevada.



## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **NAMES AND ADDRESSES OF ATTORNEYS OF RECORD**

**For the appellant:**

**HAWKINS & CANNON,**

**125 South Second Street,  
Las Vegas, Nevada.**

**KYLE Z. GRAINGER, ESQ.,**

**830 H. W. Hellman Building,  
354 South Spring Street,  
Los Angeles 13, California.**

**For the appellee:**

**MORSE & GRAVES,**

**Beckley Building,  
Las Vegas, Nevada.**

**JOHN S. HALLEY, ESQ.,**

**P. O. Box 1684,  
Reno, Nevada.**



United States District Court for the  
District of Nevada

In the Matter of

LINCOLN MINING COMPANY, INC., a Cor-  
poration,

Debtor.

**DEBTOR'S PETITION FOR CORPORATE  
REORGANIZATION**

To the Honorable Roger T. Foley, Judge of the  
United States District Court for the District of  
Nevada:

The Petition of Lincoln Mining Company, Inc.,  
the above-named debtor, respectfully shows:

1. The debtor is a corporation duly organized  
and existing under the laws of the State of Nevada  
and has had as its principal place of business at  
Hiko, Lincoln County, Nevada, within the above  
Judicial District, for a longer portion of the six  
months immediately preceding the filing of this  
petition.

2. The debtor is a corporation as defined in the  
Bankruptcy Act which could be adjudged a bank-  
rupt under the said Act, and is not a municipal,  
insurance or banking corporation, or a building and  
loan association, and is not a railroad corporation  
authorized to file a petition under Section 77 of the  
said act.

3. The debtor is unable to pay its debts as they mature, as will more particularly appear from the schedules hereinafter referred to.

4. The debtor desires that a plan of reorganization be effected under provisions of Chapter X of the Bankruptcy Act.

5. The nature of the debtor's business is mining of minerals and mineral substances, and the operation of a mill for the reduction and refining of such ores.

6. The schedule hereto annexed, marked Exhibit "A," and verified by the oath of the General Manager of the debtor, duly authorized so to do by the debtor, contains a full and true statement of all of the debts and liabilities of your petitioner.

7. The schedule hereto annexed and marked Exhibit "B," and verified by the oath of the General Manager as aforesaid of your petitioner, contains an accurate inventory of all of the assets of your petitioner.

8. The schedule hereto annexed and marked Exhibit "C," and verified by the oath of the General Manager as aforesaid of your petitioner, contains a statement of the affairs of your petitioner in the form prescribed by the General Orders in Bankruptcy for debtors engaged in business.

9. In order for your petitioner to obtain relief, it is necessary that the rights of secured creditors of the debtor be modified, and in this respect your petitioner alleges that Atolia Mining Company, a

corporation; Pacific Mining Company, a corporation, and P. R. Bradley, Jr., Trustee, by the terms of a contract of conditional sale made by them as "seller," and Wesley Koyen, Eva H. Koyen, George W. Thiriot and Dean P. Thiriot as "buyers," and which contract of conditional sale together with the property therein described was purchased by debtor, and by the terms of said purchaser assumed and agreed to pay the balance due under said contract; that the total sum of said contract was the sum of Six Thousand Dollars (\$6,000.00) payable in monthly installments of Three Hundred and Thirty-Three Dollars and Thirty-Three Cents (\$333.33) with interest on the unpaid balance at the rate of six (6%) per cent per annum; that the holder of said contract of conditional sale claims a total amount due of Three Thousand One Hundred and Eleven Dollars and Seventy-Eight Cents (\$3,111.78); that the personal property sold and described in said contract of conditional sale consists of the following:

1 mine hoist, electric motors and switches.

1 concentrator table, together with electric pumps all of the value of Six Thousand Dollars (\$6,000.00).

Debtor further alleges that there is due it from said Atolia Mining Company the sum of Four Thousand Seven Hundred and Twenty-Eight Dollars (\$4,728.00) by virtue of an assignment of an agreement entered into between said Atolia Mining Company, and said Wesley Koyen and Eva H. Koyen, and George W. Thiriot and Dean P. Thiriot, upon which there became due from said Atolia Mining

Company that said sum of Four Thousand Seven Hundred and Twenty-Eight Dollars (\$4,728.00) and which for a valuable consideration has been assigned to the debtor herein.

10. That Atolia Mining Company, a corporation; Pacific Mining Company, a corporation, and P. R. Bradley, Jr., Trustee, as "sellers" under said contract of conditional sale threaten to seize and remove the personal property consisting of the machinery herein above described, all of which is a part of a mill being operated upon the property of petitioner.

11. That by reason of the immediate danger of the removal of said property by said Atolia Mining Company, et al., your petitioner has had not sufficient time in which to prepare and submit for the approval of this Court a plan of reorganization. After the filing of this petition, debtor will ask leave of this Honorable Court to amend its petition by setting forth such plan.

Wherefore your petitioner prays:

1. That an order be entered approving the debtor's petition as properly filed;
2. That an order be entered continuing your petitioner in possession and giving directions for the conduct of your petitioner's business during the pendency of these proceedings;
3. That Atolia Mining Company, a corporation; Pacific Mining Company, a corporation, and P. R. Bradley, Jr., Trustee, and any and all other creditors, be enjoined and restrained from removing any

of the property of the debtor wherever situate, and from in any manner interfering with the operation and conduct of said business by the debtor, and for such further and other relief as the Court shall deem necessary and proper.

**LINCOLN MINING COMPANY,  
INC.,**

By /s/ **WESLEY KOYEN,**  
Debtor.

**MORSE & GRAVES, and**  
**JOHN S. HALLEY,**  
By /s/ **JOHN S. HALLEY,**  
Attorneys for Debtor.

State of Nevada,  
County of Clark—ss.

Wesley Koyen, being duly sworn, deposes and says, that he is the General Manager of Lincoln Mining Company, Inc., a Nevada corporation, the debtor in the above-entitled proceedings; that he has read the foregoing Debtor's Petition for Corporate Reorganization; that he has personal knowledge of the facts therein set forth, and that the same are true.

/s/ **WESLEY KOYEN.**

Subscribed and sworn to before me this 20th day of March, 1950.

[Seal]      /s/ **A. J. SOHUR,**  
Notary Public.

## EXHIBIT "A"

Atolia Mining Company, Pacific Mining Company, and P. R.  
 Bradley, Jr., Trustee,  
 Crocker Bank Building,  
 San Francisco, California.

Contract of Conditional Sale

Amount Claimed .....	\$3,111.78
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Bank of Nevada, Las Vegas, Nevada.

Installment Contract—

One KVA International Diesel Power Unit

Balance .....	2,750.00
---------------	----------

First National Bank of Nevada, Tonopah, Nevada.

Conditional Sales Contract on

International K-6—'49 Truck

Balance .....	3,500.00
---------------	----------

Foster Smith, Mina, Nevada.

Open Account .....	1,300.00
--------------------	----------

Kavanaugh Bros., Tonopah, Nevada.

Open Account .....	250.00
--------------------	--------

Hodges Cook Mercantile Co., Pioche, Nevada.

Open Account .....	450.00
--------------------	--------

Walter Ray, Caliente, Nevada.

Open Account .....	850.00
--------------------	--------

Van Voriees, Bishop, California.

Open Account .....	400.00
--------------------	--------

Clark County Wholesale Mercantile Co.,  
 Las Vegas, Nevada.

Open Account .....	350.00
--------------------	--------

Lincoln County, Nevada.

General Taxes, 1949 .....	400.00
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Thiriot Bros., Hiko, Nevada.

For grading and hauling.....	Amount Undetermined
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Wesley Koyen, Hiko, Nevada.

For hauling .....	Amount Undetermined
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General Labor Claims

More than six months' past due.....	Approximately \$5,000.00
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## EXHIBIT "B"

Name of Claim	Book	Page	Original Notice of Location Recorded Records of Lincoln County, Nevada	Amended Notice of Location, if Any Recorded, Records Lincoln Co., Nev.
<b>Patented Claims (U.S. Mineral Survey No. 4760)</b>				
Dome .....	L-1	384	M-1	211
Grubstake No. 2.....	L-1	328	M-1	211
Lime Cap .....	L-1	79	M-1	211
Scheelite .....	M-1	6	M-1	209
Scheelite No. 1.....	M-1	6	M-1	210
Scheelite No. 2.....	M-1	7	M-1	209
Townsite .....	L-1	402	M-1	212
Townsite No. 1.....	L-1	402	M-1	207
Townsite No. 2.....	M-1	7	M-1	213
Townsite No. 5.....	.....	.....	M-1	207
<b>Claims Held by Location</b>				
Dome No. 1.....	N-1	209-210		
Dome No. 2.....	N-1	210-211		
Grubstake No. III .....	L-1	329	N-1	248-249
Grubstake No. IV.....	L-1	329	N-1	249
Grubstake No. V.....	L-1	353		
Grubstake No. 6.....	L-1	353		
Limecap No. 1.....	L-1	327		
Limecap No. 3.....	N-1	211-212		
North Contract No. 1.....	N-1	212-213		
North Contract No. 2.....	N-1	213		
Pyramid .....	L-1	384	N-1	247-248
Pyramid No. 1.....	N-1	211		
Scheelite No. 3.....	M-1	367-368	N-1	200-201
Scheelite No. 4.....	M-1	367	N-1	201-202
Scheelite No. 5.....	M-1	368	N-1	250-251
Scheelite No. 6.....	M-1	369	N-1	251-252
Scheelite No. 7.....	N-1	213-214		
Scheelite No. 8.....	N-1	202		
Scheelite No. 9.....	N-1	203		
<b>Value of Claims—\$100,000.00 approximately.</b>				

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

### ORDER APPROVING PETITION

This cause having come on to be heard on the verified petition of the above-named debtor praying that proceedings be had under Chapter X of the Act of Congress relating to Bankruptcy, and it appearing that no notice of said hearing should be given, said debtor being represented by Morse & Graves and John S. Halley, and after hearing John S. Halley, one of the Attorneys for said debtor in favor of said petition,

Now, upon said petition and all of the proceedings had before me at the said hearing and due deliberation having been had thereon; the

#### Court Is Satisfied and Does Find

1. That the petition of Lincoln Mining Company, the above-named debtor, verified the 20th day of March, 1950, praying that proceedings be had under Chapter X of the Act of Congress Relating to Bankruptcy, complies with the requirements of said Chapter X;
2. That said petition has been filed in good faith; and

#### It Is Ordered

3. That said petition be, and it hereby is, approved.

/s/ ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed March 22, 1950.

[Title District Court and Cause.]

**ORDER CONTINUING PETITIONER IN  
POSSESSION OF ITS PROPERTY, AND  
RESTRAINING ORDER**

Upon reading and filing the petition of Lincoln Mining Company, Inc., verified by Wesley Koyen, General Manager, and the exhibits and schedules thereto annexed,

It Is Ordered That until further order of this Court, the debtor remain in possession of its property for the purpose of conducting its business during the pendency of these proceedings; that it is further ordered that Atolia Mining Company, a corporation; Pacific Mining Company, a corporation; P. R. Bradley, Jr., Trustee, and all other persons and creditors of the debtor corporation herein, be and they are enjoined and restrained from removing any of the personal property now situated upon the mining property of the debtor, and from in any manner interfering in the operation and conduct of the business of petitioner.

Dated at Reno, Nevada, this 22nd day of March, 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

### ORDER OF REFERENCE

This cause having come on to be heard on the verified petition of the above-named debtor, verified on the 20th day of March, 1950, praying that proceedings be had under Chapter X of the Act of Congress relating to bankruptcy, and the court having heretofore entered its order approving said petition after having heard John S. Halley, one of the Attorneys for said petitioner in favor of said petition,

Now, upon said verified petition and all of the proceedings had before me at the said hearing and due deliberation having been had thereon; it is

Ordered that any and all matters arising in this proceeding, except such matters as are reserved to the Judge, by the provisions of Chapter X of the Act of Congress relating to bankruptcy, be, and they hereby are, referred to Frank W. Ingram, as Referee in Bankruptcy, to hear and determine and enter orders thereon, and any and all matters reserved to the Judge by the provisions of said Chapter X of the said Act, be, and they hereby are, referred to the said Frank W. Ingram, Referee in Bankruptcy, as special Master, generally, to hear and report; and it is further

Ordered that all matters referred to Frank W. Ingram, shall be initiated before him, and all petitions and applications referred to Frank W. Ingram, as Referee or special Master, except where all parties entitled to notice consent or where

otherwise provided in Chapter X of the said Act or by order of the court, shall be brought on for hearing by notice of motion to said debtor, all parties who have intervened generally herein, all parties who have been designated by the judge to receive notice, the party or parties, if any, against whom relief is sought, and all parties who have intervened specially herein with respect to the subject matter of the petition or application; that where any of the said parties has appeared in the proceeding by attorney, service upon such party shall be made by service upon his attorney of record; that service shall be made personally or by mail; that where service is made upon any of the said parties more than one thousand (1,000) miles from Carson City, Nevada, twenty (20) days' notice shall be given, where, upon any of the said parties more than four hundred (400) and less than one thousand (1,000) miles from Carson City, Nevada, ten (10) days' notice shall be given, and in all other cases five (5) days' notice shall be given; that all notices shall contain a brief statement of the relief sought by the petition or application and the time and place of hearing, but any party may waive notice or consent to shorten the time for service thereof; and it is further

Ordered that the special master shall report upon all matters brought before him, and his report shall contain a form of order recommended by the special master to be made and entered on such report; that when the report of the special master is upon a contested matter, the special master shall file the origi-

nal of such report with the clerk of this court and shall give notice of such filing to all parties who shall have appeared at the hearing before the special master on the matter to which such report relates, and, unless within ten (10) days from the filing of such report, written objections thereto shall be filed with the clerk and copies of such objections shall be served on all such parties, the report shall stand confirmed, and, in that event, or if the report of the special master is upon an uncontested matter, any party may submit to the judge acting in this proceeding, the order, if any, recommended by the special master to be made and entered on such report; that if timely objections to such report shall be filed and served, as above provided, any and all such parties may make application to the court for action upon the report and upon the objections thereto by motion on due notice to all other such parties; and it is further

Ordered that the special master may authorize the employment of stenographers for reporting and transcribing the proceeding before him, subject to the provisions of the said Act and the rules of this court; and it is further

Ordered that this court reserves the right and jurisdiction to make such orders amplifying, extending or limiting, or otherwise modifying this order as to the court may seem proper.

/s/ ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed March 22, 1950.

In the United States District Court for the  
District of Nevada

In Reorganization Chapter X A-60-A

In the Matter of

**LINCOLN MINING COMPANY, INC.,**

Debtor.

**PROPOSAL OF PLAN FOR THE REORGANIZATION OF LINCOLN MINING COMPANY, INC., DEBTOR**

John S. Halley and Morse & Graves, attorneys for Lincoln Mining Company, Inc., Debtor, have prepared and propose the annexed plan for the reorganization of the said debtor.

Dated at Las Vegas, Nevada, June 26, 1950.

Respectfully submitted,

JOHN S. HALLEY, and  
MORSE & GRAVES,

By /s/ HAROLD M. MORSE,

Attorneys for Lincoln Mining  
Company, Inc.

[Endorsed]: Filed June 28, 1950, Referee.

[Title of District Court and Cause.]

**PLAN OF REORGANIZATION LINCOLN  
MINING COMPANY, INC.**

The above-named debtor proposes the following plan for reorganization:

**I.**

The capital stock of the debtor corporation is all common stock and is all owned by George W. Thiriot, Dean P. Thiriot, Wesley Koyen and Eva H. Koyen, each owning one-fourth of the outstanding capital stock; that none of the capital stock is owned by any other persons; that twenty-five per cent of the capital stock of said corporation has by action of the board of directors been designated treasury stock and has not been issued to anyone and remains in the treasury; that no public offering of the capital stock of said corporation has ever been made; that the capital stock was issued by said corporation to said named persons as consideration of the conveyance by them to the corporation of the assets of the said corporation, consisting of the mining property and the mining equipment and machinery and milling equipment and machinery, as set forth in the debtors' petition for reorganization.

**II.**

That there was no preferred stock issued by said corporation and there are no bond holders of said corporation; that there is no mortgage upon any of the property of said corporation, save and except

certain liens against specific property, which liens are evidenced by conditional sales contracts.

### III.

That said corporation has been engaged in operating the mining property set forth in its petition, in the North Tempiute Mining District, Lincoln County, Nevada; that the chief mineral ore being extracted from said claims is scheelite or tungsten, and that said corporation has a contract to sell all concentrates produced from the mining and production of said ore from said mine, said contract being effective to the 1st day of February, 1951; that the indebtedness incurred by the said corporation was incurred primarily for the purchase and installation of equipment on the premises, both in the mine and at the mill, and development work for developing new bodies of ore.

### IV.

That the following is a list of the obligations of said corporation which have priority under the law:

(A) Claim of the United States for Taxes .....	\$ 47.74
(B) The following claims are secured:	
1. Atolia Mining Company, Pacific Mining Company, and P. R. Bradley, Jr., Trustee, Crocker Bank Bldg., San Francisco.....	6,000.00
Contract on Conditional Sale	

2. Atolia Mining Company, Pacific Mining Company, and P. R. Bradley, Jr., Trustee, Open Account..... 1,700.00
3. Bank of Nevada, Las Vegas, Nevada, Installment contract—One KVA International Diesel Power Unit, Balance..... 2,750.00

(C) The following claims are unsecured:

1. Foster Smith, Mina, Nevada..... 1,365.00
2. Kavanaugh Bros., Tonopah, Nev.... 250.00
3. Hodges Cook Mercantile Co., Pioche, Nevada ..... 448.80
4. Walter Ray, Caliente, Nevada..... 820.74
5. Van Voriees, Bishop, California.... 400.00
6. Clark Co., Wholesale Merc. Co., Las Vegas, Nevada..... 206.77
7. Lincoln County, Nev., General Taxes, 1949 ..... 555.00
8. Thiriot Bros., Hiko, Nevada,  
Amount undetermined

(Dean P. Thiriot is a member of Thiriot Bros., and also owns a one-quarter interest in the capital stock of said corporation.)

9. Wesley Koyen, Hiko, Nevada,  
Amount undetermined  
(Wesley Koyen also is a stock-

holder in said corporation and owns  
a one-quarter interest therein.)

10. General Labor claims, more than six months past due, Approximately . . . . .	5,000.00
11. Gottfredson's, Caliente, Nevada . . . . .	100.00
12. Union Assay Office, Salt Lake City, Utah . . . . .	3.00
13. Bellville, Mina, Nevada . . . . .	23.65
14. Ray Orr, Pioche, Nevada . . . . .	22.00
15. Public Utility, Caliente, Nevada . . . . .	40.50
16. Ely Valley Mine, Pioche, Nevada . . . . .	6.00
17. Combine Metal, Pioche, Nevada . . . . .	27.90
18. Nevada Unemployment Compensation . . . . .	35.80
	8.82
19. Standard Oil Co., Bishop, California	35.65
20. Standard Oil Co., Tonopah, California . . . . .	41.31
21. Wesley Koyen . . . . .	57.00

That on or about the 1st day of April, 1950, the Board of Directors of said corporation by unanimous vote passed a resolution that Wesley Koyen, Hiko, Nevada, be appointed general manager of said corporation while said corporation was in reorganization; that since that date he has acted and is now acting as general manager of said corporation.

## VI.

That said corporation be authorized to borrow up to \$7500.00 as for working capital and to pledge the real and personal property of said corporation as security therefor, and which said pledge shall have priority over all unsecured claims, and that from said loan the said general manager be authorized to negotiate with the Atolia Mining Company, being the chief creditor having a secured claim on certain equipment owned by the said corporation, for a compromise of their claim, and to pay off the balance found due said corporation.

## VII.

That the corporation continue its mining and milling operations, mine its ore, reduce the same through its mill to concentrates and sell said concentrates under its sales contract, and from the proceeds therefrom to use 75% of the net proceeds to pay the debts of said corporation, and that 25% of the net proceeds be retained by said corporation as operating capital and for a reserve.

## VIII.

That the general manager, Wesley Koyen, be paid the sum of \$10.00 per day for his work and labor in mining and as being general manager.

## IX.

That John S. Halley, Reno, Nevada, and Morse & Graves, Las Vegas, Nevada, be attorneys for the debtors while the corporation is under reorganization.

X.

That the general manager of said corporation, Wesley Koyen, estimates that, with the supplying of the working capital as above specified so that the milling operations may be continued, as a result of the mining and milling operations of said corporation during reorganization, a net return of approximately \$750.00 per month will be available to pay off the indebtedness of said corporation.

XI.

That all costs of administration and all claims filed and allowed be duly paid, and that then these proceedings be dismissed and the property then be returned to the corporation.

Respectfully submitted,

LINCOLN MINING  
COMPANY, INC.

By /s/ WESLEY KOYEN,  
General Manager.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DEBTOR  
TO ITEMIZE AND NAME CREDITORS  
LISTED IN PLAN OF REORGANIZATION  
AS LIST REQUIRED AND ORDERED  
UNDER SECTION 163 OF BANKRUPTCY  
ACT

At Reno, in said district, this 29th day of June,  
1950.

It appearing in response to this Court's order of

April 13th, 1950, and extension of time heretofore granted that above-named debtor has included in its proposed plan of reorganization the names of its stockholders and the list of creditors required under Section 163 of the bankruptcy act except for item 10 in paragraph IV of such plan listed as "10 General Labor Claims more than six months past due, approximately \$5,000.00": that this listing is insufficient and should show the name, the address, period worked, occupation and amount of each claim. It is therefore

Ordered that the debtor shall submit an amendment to its schedule of debts giving the name, address, period worked, occupation and amount of claim for each creditor generally grouped in item 10 of paragraph IV of debtor's proposed plan of reorganization within 10 days and when such amendment is filed with the Referee undersigned this will be considered as the filing of the list of creditors and their amount claimed under Section 163 of the Bankruptcy Act ordered on April 13, 1950.

/s/ FRANK W. INGRAM,

Referee in Bankruptcy.

[Endorsed]: Filed June 29, 1950, Referee.

[Endorsed]: Filed June 30, 1950, U.S.D.C.

[Title of District Court and Cause.]

SUPPLEMENT TO PROPOSAL OF PLAN FOR  
REORGANIZATION OF LINCOLN MIN-  
ING COMPANY, INC., DEBTOR

John S. Halley and Morse & Graves, attorneys for Lincoln Mining Company, Inc., Debtor, have prepared and submit the annexed supplement to plan for reorganization of the said debtor.

Dated at Las Vegas, Nevada, this 7th day of July, 1950.

Respectfully submitted,

JOHN S. HALLEY, and  
MORSE & GRAVES,  
By HAROLD M. MORSE,  
Attorneys for Lincoln Mining  
Company.

In the United States District Court for the  
District of Nevada

In the Matter of

Lincoln Mining Company, Inc.,

Debtor.

In Reorganization  
Chapter X  
A-60-A

SUPPLEMENT TO PLAN OF REORGANIZATION WITH ITEMIZATION OF  
CREDITORS HERETOFORE GROUPED AS ITEM 10 OF PARAGRAPH IV  
OF PROPOSED PLAN OF REORGANIZATION

Name and Address	Dates Worked	Occupation	Wages less Board Miner	Balance
Frank Belt, Las Vegas, Nev.	10/ 4/48 to 3/ 4/49	Miner	\$ 403.54	\$203.54
O. H. Gulack, Hiko, Nev.	11/ 5/48 to 3/ 5/49	Construction	1,113.11	813.11
W. Brady, Hiko, Nev.	1/ 1/49 to 1/31/49	Mill Helper	39.50	39.50
W. J. Tinkle, Hiko, Nev.	5/ 9/49 to 7/ 1/49	Mine Helper	179.92	66.92
Wm. Showalter, Hiko, Nev.	8/ 5/49 to 12/23/49	Mill Supt.	1,082.95	425.43
Anselmo Gomoz, Hiko, Nev.	8/11/49 to 8/21/49	Miner	19.80	19.80
J. W. Moore, Hiko, Nev.	8/12/49 to 8/27/49	Mine Helper	33.40	33.40
Robert Koyen, Hiko, Nev.	7/ 3/49 to 8/ 6/49	Mine Helper	184.79	.....
Grant Wadsworth, Panaea, Nev.	8/26/49 to 10/ 1/49	Truck Driver	338.64	.....
Alvin Kaze, Hiko, Nev.	8/29/49 to 10/27/49	Mine Helper	279.34	45.75
Orland McDowell, Tonopah, Nev.	9/16/49 to 10/27/49	Mill Helper	228.35	65.00
Charles Priester, Tonopah, Nev.	9/16/49 to 10/27/49	Mine Helper	260.73	74.06
Carl Sly, Hiko, Nev.	9/16/49 to 10/16/49	Miner	128.36	16.38
Elton Chaffin, Hiko, Nev.	11/14/49 to 11/27/49	General Work	18.42	3.00
Bill Dinsmore, Hiko, Nev.	11/19/49 to 11/26/49	Miner	18.90	18.90
Frank Kane, Hiko, Nev.	12/ 5/49 to 12/19/49	General Work	5.07	5.07
Charles Hasking, Hiko, Nev.	12/ 8/49 to 12/19/49	General Work	34.46	34.46
				\$3,041.41
		Total		

[Endorsed]: Filed July 13, 1950, Referee.

[Title of District Court and Cause.]

**ORDER FOR HEARING OF OBJECTIONS OR  
AMENDMENTS TO PLAN PROPOSED BY  
DEBTOR IN POSSESSION UNDER SEC-  
TION 170 OF BANKRUPTCY ACT AND  
TO CONTINUANCE AND TO HEARING  
OBJECTIONS, IF ANY, TO THE CON-  
TINUANCE OF THE DEBTOR IN POS-  
SESSION UNDER SECTION 162 OF SAID  
ACT**

At Reno, in said District, on the 25th day of July,  
1950.

It appearing to the Court that the Lincoln Mining Company, a corporation, did on the 22nd day of March, 1950, file its petition for corporate reorganization under Chapter X of the Bankruptcy Act; that thereafter and on the same date this Court made its order finding that such petition was filed in good faith and approving the same; Thereafter and on the same date this Court made its order continuing the Lincoln Mining Company, Inc., in possession, restraining certain creditors from removing certain personal property from the debtor's possession; Thereafter and on the same date the undersigned District Judge made a general order of reference to Frank W. Ingram as Referee in Bankruptcy and as Special Master; Thereafter this Court made its order instructing the Lincoln Mining Company to file plan of reorganization and continuing time of hearings thereon and the Referee and Special Master filed orders requiring said

debtor to furnish a schedule of its creditors by class and of its stockholders; Thereafter and on the 30th day of June, 1950, the debtor filed a proposed plan of reorganization and completed such filing on the order of the Referee on July 14th and an opportunity be given creditors and stockholders to object to the continuance of the debtor in possession as provided in Section 162 of the Bankruptcy Act, being Section 562, Title 11, U.S.C.A., and an opportunity for the creditors and stockholders to present objections and amendments to the plan of reorganization heretofore submitted by the debtor corporation; it is therefore

Ordered that September 1, 1950, at 9:30 a.m., United States District Court Room, Post Office Building, Las Vegas, Nevada, be and it hereby is fixed as the time and place for the hearing of objections to the continuance of said debtor in possession as provided in Section 162 of the Bankruptcy Act, being Section 562 of Title 11, U.S.C.A.; it is further

Ordered that September 1, 1950, at 9:30 a.m., United States Court Room, Las Vegas, Nevada, be and it hereby is fixed as the time and place for a hearing on the plan of the debtor for reorganization and for a consideration of any objections or amendments thereto; it is further

Ordered that on or before the 15th day of August, 1950, the said debtor shall, at the expense of the estate, prepare, make oath to and file in this Court (a) Schedule of its property, showing the location, quantity and money value thereof; (b) A summary of its operations since the filing of the petition and

the order of this Court continuing debtor in possession on March 22, 1950, showing its receipts and disbursements, to whom paid and the services performed by such payees; it is further

Ordered that the said debtor be and it hereby is directed to give notice of the hearing fixed in this order at least thirty (30) days prior to September 1, 1950, by mailing such notices to its creditors and stockholders as the same may appear upon its records or may be otherwise shown to the Secretary of the Treasury at Washington, District of Columbia, by mailing two copies of such notice to the Securities and Exchange Commission by registered first class mail, postage prepaid, addressed to it at Washington, District of Columbia, or such other place as the Securities and Exchange Commission shall designate by written notice filed in the proceedings and served upon the parties to the proceedings and by publication in the Las Vegas Review Journal, a newspaper published and having a general circulation in Las Vegas, Nevada, for one publication on or before the first day of August, 1950. Such notice to be in the following form: Notice of hearing under Sections 161 and 170 of the Bankruptcy Act, in the District Court of the United States for the District of Nevada, in the matter of Lincoln Mining Company, Inc., debtor, in proceedings for reorganization of a corporation, A-60-A. To all creditors and stockholders and other parties in interest, notice is hereby given that on the 22nd day of March, Lincoln Mining Company, Inc., the above-named debtor, filed a petition in this Court, praying that

proceedings be heard under Chapter X of the Act of Congress relating to bankruptcy and that on March 22, 1950, an order was entered by said Court approving said petition and continuing said debtor in possession. Notice is further given that September 1, 1950, at 9:30 a.m., United States District Court Room, United States Post Office Building, city of Las Vegas, state of Nevada, has been fixed as the time and place for the hearing of objections to the continuance of said debtor in possession. Notice is further given that September 1, 1950, has been fixed as the time and place for the hearing of objections and amendments to the debtor's proposed plan of reorganization. This notice is accompanied by copy of a plan of its reorganization, filed and proposed by said debtor. Notice is further given that said hearing may be adjourned from time to time without notice to said creditors, stockholders, or other parties of interest other than the announcement of the adjourned date or dates at the hearings. Being order of the Court, dated at Reno, Nevada, July 25, 1950.

LINCOLN MINING  
COMPANY, INC.

By .....  
President Debtor.

Affidavit of mailing and proof of publication in the above shall be furnished Referee in Bankruptcy. It is further

Ordered that the hearings hereinbefore fixed by this order shall be heard by the Referee and Special

Master as provided in the general reference order of March 22nd to him as Referee and Special Master; it is further

Ordered that this Court reserves full right and jurisdiction to make at any time and from time to time such orders for the purpose of vacating, amplifying, extending, limiting, or otherwise modifying this order as the Court shall deem proper.

/s/ ROGER T. FOLEY,  
United States District Judge.

[Endorsed]: Filed July 27, 1950.

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[Title of District Court and Cause.]

ORDER APPROVING PLAN OF  
REORGANIZATION

At Reno, in said district, this 26th day of September, 1950.

A hearing having been held on the 1st day of September, 1950, before the Referee and Special Master, Frank W. Ingram, pursuant to the order of this Court, dated the 25th day of July, 1950, on the plan for the reorganization of the Lincoln Mining Company, Inc., the above-named debtor, prepared and filed herein by the said debtor, and for the consideration of any objections which might be made, or of such amendments or plans as might be proposed by said debtor or by any creditor or stockholder herein, and notice of said hearing hav-

ing been given as required by Section 171 of the Act of Congress relating to bankruptcy, and in accordance with the said order of July 25, 1950, and the Referee having proposed an amendment to the plan which the creditors and debtor accepted and the proposed plan having been forwarded to the Security Exchange Commission and the Referee having received advice that such commission was not participating in the case because of the absence of any public investor interest and it further appearing that the scheduled indebtedness of the debtor does not exceed \$25,000 and it will not be necessary for an examination and report on the plan as provided in Section 172 of the Bankruptcy Act, and the report and recommendations of the Referee and Special Master having been received and filed on the 22nd day of September, 1950.

Now upon the plan for the reorganization of Lincoln Mining Company, Inc., said debtor prepared and filed by said debtor, and the amendments thereon proposed at the meeting of creditors held September 1, 1950, and accepted by the debtor at such meeting, and the report and recommendations of the Referee and Special Master with his findings, which report and findings the Court adopts and approves as the summary and findings of this Court, and the Court being of the opinion that said plan, as amended, complies with the provisions of Section 216 of the said Act, and is fair and equitable, and feasible and the Court having adopted the report and findings of the Referee and Special Master as its opinion thereon; it is

Ordered that the said plan for the reorganization of the Lincoln Mining Company, Inc., the above-named debtor, prepared and filed by the said debtor, as amended, be, and it hereby is, approved; and it is further

Ordered that November 10, 1950, be, and it hereby is, fixed as the last day of a time within which creditors and stockholders herein affected by the said plan may accept the same in writing filed with Frank W. Ingram, Referee and Special Master, herein, 325 Ridge Street, Reno, Nevada, and such filing with such Referee and Special Master shall be deemed filing in this Court, and the creditors and stockholders are advised that for the purpose of determining the required amount for acceptance of the plan under Section 179 of said Act that their claims must be filed and allowed prior to the 10th day of November, 1950, and it is further

Ordered that the report of the Referee and Special Master is adopted by the Court as the summary of the plan and opinion of the Court and annexed hereto marked Exhibit A and made a part hereof, and the same be, and it hereby is, approved as the summary required by Section 175 (1) of the said Act, and the opinion of the Court, it is further

Ordered that within 10 days after the entry of this order, the debtor shall transmit by mail to each creditor and stockholder of the said debtor who is affected by the said plan, at his address appearing upon the debtor's books or otherwise known to him, a copy of said plan as amended, together with a copy of the summary thereof and opinion of the

Court herein approved, together with a copy of this order, a copy of the notice hereto annexed, marked Exhibit B and made a part thereof, and appropriate forms for acceptance from among the forms hereto annexed, marked Exhibits C and D and made a part hereof, which the Court deems desirable for the information of creditors and stockholders herein.

/s/ ROGER T. FOLEY,  
District Judge.

### EXHIBIT A

[Title of District Court and Cause.]

### REPORT OF REFEREE AND SPECIAL MASTERS ON HEARINGS ON OBJECTIONS OF AMENDMENTS TO PLAN UNDER SECTION 170 AND FOR CONTINUANCE OF DEBTOR IN POSSESSION UNDER SECTION 162 OF BANKRUPTCY ACT

In compliance with the orders of the Court dated the 25th day of July, 1950, and upon notice to all creditors and stockholders as required in such order the Referee and Special Master held hearings for the purpose of hearing any objections or amendments of the plan proposed by the debtor in possession under Section 170 and to the continuance of the debtor in possession under Section 162 of the Act, at Las Vegas, Nevada, on the 1st day of September, 1950. The debtor being represented by his attorney and there being certain creditors present

at such meeting, transcript of which was taken by the Referee and Special Master, summary of which is reported herewith.

1. At said hearing there was no objections to the debtor remaining in possession.

2. Modifications of the plan were approved by creditors and representative of the debtor present, such modifications and changes are as follows:

(a) Page 2 of plan, Paragraph IV b (3), Bank of Nevada, Las Vegas, Nevada, figure changes from \$2750.00 to \$2250.00.

(b) Fourth page of the plan amended by striking out all of the last two sentences in paragraph 7 reading as follows: "paying off first the secured claims, and secondly, the unsecured claims; and that 25% of the net proceeds be retained by said corporation as operating capital and for a reserve."

(c) Striking out all of paragraph 9 of the proposed plan and renumbering paragraphs 10 and 11 accordingly.

3. That with the modifications and amendments above referred to the plan proposes to pay the creditors prior to any claims of the stockholders and that upon payment of all of such claims and the costs of administration the property should then be returned to the corporation.

4. The Security and Exchange Commission have indicated by letter to the Referee and Special Master that there is no public interest involved in the stock distribution of this company and that they

would not be interested or participate in the hearings.

5. There is a petition pending for the reclamation of certain mining machinery by the Atilio Mining Company against which an answer has been filed claiming substantial off-sets against such claim but that the plan proposes to borrow sufficient money with which to absorb and pay off any pending fund to be due Atilio Mining Company.

6. That since the debtor has filed petition under reorganization they have devoted their energies to perfecting a flow-sheet and mining operation which, according to the testimony at the hearing, will permit an economically sound operation, particularly in view of the increased price of tungsten W03 concentrates and the need for such material in the war effort. Further testimony disclosed that the National Resources Board proposes contracts for delivery of tungsten for a three year period at a substantial increase in price.

7. That the creditors represented at such hearing expressed the opinion that a continuance of the operation by the debtor was to be preferred to liquidation of the assets of the corporation at this time.

8. That the plan is feasible, economical and complies with the requirements of Section 221, being Section 621 U.S.C.A. That it is fair and equitable and that no priority payments to creditors is involved.

9. That the schedule of property filed by the

debtor estimates the value of the property at \$165,-000.00, secured claims total \$9950.00 on machinery, tax claim by United States \$47.74 and Unemployment Compensation claims of around \$100.00 yet to be determined, and unsecured claims in the neighborhood of \$11,000.00

Testimony at the hearing indicated that there should be an income of at least \$1,000.00 a month to be applied to the unsecured claims and that the secured claimants would be taken care of by refinancing or loans requested under the plan of reorganization.

The Referee and Special Master, therefore recommends the approval of the attached order and certifies that he has sent signed a copy of this report to the debtor with instructions that unless objections to such order is made within ten days the Court will approve the same as provided in the order of reference to the Referee and Special Master, filed March 22, 1950.

/s/ FRANK W. INGRAM,

Referee and Special Master.

I certify that a copy of the foregoing report with proposed order attached was mailed to the Lincoln Mining Company, c/o Morse and Graves, attorneys, 121 Fremont St., Las Vegas, this 21st day of September, 1950.

.....  
Clerk.

[Endorsed]: Filed September 22, 1950.

## EXHIBIT B

[Title of District Court and Cause.]

NOTICE TRANSMITTED UNDER  
SECTION 175

To All Creditors and Stockholders of Lincoln Mining Company, Inc., Notice Is Hereby Given

1. On October . . ., 1950, this Court approved a plan for the reorganization of Lincoln Mining Company, Inc., the above-named debtor, prepared and filed by the debtor in possession.
2. In accordance with said order, there is transmitted
  - (a) A copy of said plan, as amended, together with a copy of the summary thereof approved by the judge.
  - (b) A copy of the opinion of the Judge approving said plan (Referee's report approved as summary and opinion).
  - (c) Appropriate forms for the acceptance of said plan.
3. By order of October . . ., 1950, acceptances may be filed in writing by all creditors and stockholders affected by the said plan on or before the 10th day of November, 1950, with Frank W. Ingram, Referee and Special Master herein, at his office, 325 Ridge Street, Reno, Nevada.
4. Appropriate forms for acceptance of said plan are enclosed for the convenience of creditors

and stockholders, if they desire to accept plan. Other forms may be obtained from the undersigned upon request.

5. Acceptances will be effective only as to proofs of claim of creditors and the interests of stockholders which have been filed and allowed herein.

By Order of the Court

Dated, Las Vegas, Nevada, October . . . . , 1950.

LINCOLN MINING COMPANY,  
INC.,

By GEORGE W. THIRIOT,  
President.

c/o MORSE AND GRAVES,  
Attorneys,

121 Fremont Street, Las  
Vegas, Nevada.

### EXHIBIT C

[Title of District Court and Cause.]

### ACCEPTANCE BY HOLDER OF COMMON STOCK

The undersigned, the holder of . . . . shares of the Common Stock of Lincoln Mining Company, Inc., the above-named debtor, whose proof of stock interest has been filed and allowed herein, hereby accepts the amended plan for the reorganization of Lincoln Mining Company, Inc., said debtor, ap-

proved by this Court under Section 174 of the Act  
of Congress relating to bankruptcy on October  
....., 1950.

Dated ....., 1950.

.....,  
Stockholder signs on this line.

.....,  
Print or type name of stock-  
holder on this line.

.....,  
Print or type address.

.....,  
City or State.

Certificate No.

Registered in name of

.....  
.....  
.....

.....  
.....  
.....

List all certificates of common stock. (If acceptance  
is executed by a trustee, attorney, executor, admin-  
istrator, officer of a corporation or any other person  
acting in a representative capacity, submit evidence  
of authority of such person to act.)

**EXHIBIT D****[Title of District Court and Cause.]****ACCEPTANCE BY HOLDER OF GENERAL  
CLAIM**

The undersigned, a creditor of Lincoln Mining Company, Inc., the above-named debtor, whose claim in the amount of

..... (\$.....)

State amount here

has been filed and allowed herein, hereby accepts the amended plan for the reorganization of Lincoln Mining Company, Inc., said debtor, approved by this Court under Section 174 of the Act of Congress relating to bankruptcy on October ....., 1950.

Dated ....., 1950.

.....,  
Signature of individual or  
name of corporation.

By..... Title.....

Print name.....

Street address.....

City and State .....

(If acceptance is executed by a trustee, attorney, executor, administrator, guardian, officer of a corporation or any other person acting in a representative capacity, proper evidence of the authority of such person to act must be submitted.)

[Title of District Court and Cause.]

**PLAN OF REORGANIZATION  
LINCOLN MINING COMPANY, INC.**

The above-named debtor proposes the following plan for reorganization:

**I.**

The capital stock of the debtor corporation is all common stock and is all owned by George W. Thiriot, Dean P. Thiriot, Wesley Koyen and Eva H. Koyen, each owning one-fourth of the outstanding capital stock; that none of the capital stock is owned by any other persons; that twenty-five per cent of the capital stock of said corporation has by action of the Board of Directors been designated treasury stock and has not been issued to anyone and remains in the treasury; that no public offering of the capital stock of said corporation has ever been made; that the capital stock was issued by said corporation to said named persons as consideration of the conveyance by them to the corporation of the assets of the said corporation, consisting of the mining property and the mining equipment and machinery and milling equipment and machinery, as set forth in the debtors' petition for reorganization.

**II.**

That there was no preferred stock issued by said corporation and there are no bond holders of said corporation; that there is no mortgage upon any of

the property of said corporation, save and except certain liens against specific property, which liens are evidenced by conditional sales contracts.

### III.

That said corporation has been engaged in operating the mining property set forth in its petition, in the North Tempiute Mining District, Lincoln County, Nevada; that the chief mineral ore being extracted from said claims is scheelite or tungsten, and that said corporation has a contract to sell all concentrates produced from the mining and production of said ore from said mine, said contract being effective to the 1st day of February, 1951; that the indebtedness incurred by the said corporation was incurred primarily for the purchase and installation of equipment on the premises, both in the mine and at the mill, and development work for developing new bodies of ore.

### IV.

That the following is a list of the obligations of said corporation which have priority under the law:

- |  |
|--|
| (a) Claim of the United States<br>for Taxes.....\$ 47.74   |
| (b) The following claims are secured:<br><br>1. Atolia Mining Company, Pacific<br>Mining Company, and P. R. Bradley,<br>Jr., Trustees, Crocker Bank Bldg., San<br>Francisco, California. .... 6000.00<br>Contract on conditional sale. |

2. Atolia Mining Company, Pacific Mining Company, and P. R. Bradley, Jr., Trustee, .....	1700.00
Open account.	
3. Bank of Nevada, Las Vegas, Nevada. Installment Contract—One KVA International Diesel Power Unit, Balance .....	2250.00

(c) The following claims are unsecured:

1. Foster Smith, Mina, Nevada....	1365.00
2. Kavanaugh Bros., Tonopah, Nev.	250.00
3. Hodges Cook Mercantile Co., Pioche, Nevada .....	448.00
4. Walter Ray, Caliente, Nevada..	820.74
5. Van Voriees, Bishop, California	400.00
6. Clark Co., Wholesale Merc. Co., Las Vegas, Nev.....	206.77
7. Lincoln County, Nevada, General Taxes, 1949 .....	555.00
8. Thiriot Bros., Hiko, Nevada. Amount undetermined (Dean P. Thiriot is a member of Thiriot Bros., and also owns a one-quarter interest in the capital stock of said corporation)	
9. Wesley Koyen, Hiko, Nevada, Amount undetermined. (Wesley Koyen also is a stockholder in said corporation and owns a one - quarter interest therein .....	

10.	General Labor Claims, more than six months past due. Approximately .....	5000.00
11.	Gottfredson's, Caliente, Nevada	100.00
12.	Union Assay Office, Salt Lake City, Utah .....	3.00
13.	Bellville, Mina, Nevada.....	23.65
14.	Ray Orr, Pioche, Nevada.....	22.00
15.	Public Utility, Caliente, Nevada	40.50
16.	Ely Valley Mine, Pioche, Nevada .....	6.00
17.	Combine Metal, Pioche, Nevada	27.90
18.	Nevada Unemployment Compensation .....	35.80
		8.82
19.	Standard Oil Co., Bishop Calif.	35.65
20.	Standard Oil Co., Tonopah, Nev.	41.31
21.	Wesley Koyen .....	57.00

That on or about the 1st day of April, 1950, the Board of Directors of said corporation by unanimous vote passed a resolution that Wesley Koyen, Hiko, Nevada, be appointed general manager of said corporation while said corporation was in reorganization; that since that date he has acted and is now acting as general manager of said corporation.

## VI.

That said corporation be authorized to borrow up to \$7500.00 as and for working capital and to pledge the real and personal property of said corporation as security therefor, and which said pledge

shall have priority over all unsecured claims, and that from said loan the said general manager be authorized to negotiate with the Atolia Mining Company, being the chief creditor having a secured claim on certain equipment owned by said corporation, for a compromise of their claim, and to pay off the balance found due said corporation.

## VII.

That the corporation continue its mining and milling operations, mine its ore, reduce the same through its mill to concentrates and sell said concentrates under its sales contract, and from the proceeds to pay the debts of said corporation.

## VIII.

That the general manager, Wesley Koyen, be paid the sum of \$10.00 per day for his work and labor in mining and as being general manager.

## IX.

That the general manager of said corporation, Wesley Koyen, estimates that, with the supplying of the working capital as above specified so that the milling operations may be continued, as a result of the mining and milling operations of said corporation during reorganization, a net of approximately \$750.00 per month will be available to pay off the indebtedness of said corporation.

X.

That all costs of administration and all claims filed and allowed be duly paid, and that then these proceedings be dismissed and the property then be returned to the corporation.

Respectfully submitted,

LINCOLN MINING COMPANY,  
INC.,

By WESLEY KOYEN,  
General Manager.

[Title of District Court and Cause.]

SUPPLEMENT TO PROPOSAL OF PLAN FOR  
REORGANIZATION OF LINCOLN MIN-  
ING COMPANY, INC., DEBTOR

John S. Halley and Morse & Graves, attorneys for Lincoln Mining Company, Inc.; George W. Thiriot, President, Debtor, have prepared and submit the annexed supplement to plan for reorganization of the said debtor.

Dated at Las Vegas, Nevada, this 7th day of July, 1950.

Respectfully submitted,

JOHN S. HALLEY, and  
MORSE & GRAVES,  
By HAROLD M. MORSE,

Attorneys for Lincoln Mining  
Company.

SUPPLEMENT TO PLAN OF REORGANIZATION WITH ITEMIZATION OF  
 CREDITORS HERETOFORE GROUPED AS ITEM 10 OF PARAGRAPH IV  
 OF PROPOSED PLAN OF REORGANIZATION

Name and Address	Dates Worked	Occupation	Wages less Board	Balance
Frank Belt, Las Vegas, Nev.	10/ 4/48 to 3/ 4/49	Miner	\$ 403.54	\$203.54
O. H. Gulaek, Hiko, Nev.	11/ 5/48 to 3/ 5/49	Construction	1,113.11	813.11
W. Brady, Hiko, Nev.	1/ 1/49 to 1/31/49	Mill Helper	39.50	.....
W. I. Tinkle, Hiko, Nev.	5/ 9/49 to 7/ 1/49	Mine Helper	179.92	66.92
Wm. Showalter, Hiko, Nev.	8/ 5/49 to 12/23/49	Mill Supt.	1,082.95	425.43
Anselmo Gomoz, Hiko, Nev.	8/11/49 to 8/21/49	Miner	19.80	19.80
J. W. Moore, Hiko, Nev.	8/12/49 to 8/27/49	Mine Helper	33.40	33.40
Robert Koven, Hiko, Nev.	7/ 3/49 to 8/ 6/49	Mine Helper	184.79	.....
Grant Wadsworth, Panaca, Nev.	8/26/49 to 10/ 1/49	Truck Driver	338.64	338.64
Alvin Kaze, Hiko, Nev.	8/29/49 to 10/27/49	Mine Helper	279.34	233.59
Orland McDowell, Tonopah, Nev.	9/16/49 to 10/27/49	Mill Helper	228.35	65.00
Charles Priester, Tonopah, Nev.	9/16/49 to 10/27/49	Mine Helper	260.73	74.06
Carl Sly, Hiko, Nev.	9/16/49 to 10/16/49	Miner	128.36	16.38
Elton Chaffin, Hiko, Nev.	11/14/49 to 11/27/49	General Work	18.42	3.00
Bill Dinsmore, Hiko, Nev.	11/19/49 to 11/26/49	Miner	18.90	18.90
Frank Kane, Hiko, Nev.	12/ 5/49 to 12/19/49	General Work	5.07	5.07
Charles Hasking, Hiko, Nev.	12/ 8/49 to 12/19/49	General Work	34.46	34.46
				\$3,041.41
			Total.....	

Morse & Graves  
Law Offices  
P. O. Box 791  
121 Fremont Street  
Las Vegas Nevada

September 25, 1950

Hon. Frank W. Ingram  
Referee In Bankruptcy  
325 Ridge Street  
Reno, Nevada

Re: Lincoln Mining Company  
A-60-A

Dear Frank:

Thank you for your letter of September 21, 1950, with enclosures.

We have no objections to the form or substance of the Report of Referee and Special Master, and the proposed order approving the plan of reorganization. When we receive word that the court has executed the order, we will then have the matters mimeographed and transmitted to the creditors and stockholders, as you suggest.

We enclose herewith our check in the sum of \$10.00 for filing the Answer to Petition of Atolia Mining Company to reclaim Property, in accordance with your letter of September 19, 1950.

Sincerely yours,

MORSE & GRAVES,

By /s/ HAROLD M. MORSE,

HMM/ML  
Enclosure

[Endorsed]: Filed September 26, 1950.

[Title of District Court and Cause.]

PROPOSAL OF PLAN FOR REORGANIZATION  
OF LINCOLN MINING COMPANY,  
INC., DEBTOR

G. W. Thiriot, President of Lincoln Mining Company, Inc., Debtor, have prepared and propose the annexed plan for the reorganization of the said debtor. This proposal to supersede all previous proposals or contracts made and signed by me.

Dated at Hiko, Nevada, Oct. 31, 1950.

Respectfully submitted,

/s/ G. W. THIRIOT,

President of Lincoln Mining  
Company, Inc.

PLAN OF REORGANIZATION  
LINCOLN MINING COMPANY, INC.

The above-named debtor proposes the following plan for reorganization:

I.

The capital stock of the debtor corporation is all common stock and is all owned by George W. Thiriot, Dean P. Thiriot, Wesley Koyen and Eva Koyen, each owning one-fourth of the outstanding capital stock; that none of the capital stock is owned by any other persons; that twenty-five per cent of the capital stock of said corporation has by action of the board of directors been designated treasury

stock and has not been issued to anyone and remains in the treasury; that no public offering of the capital stock of the corporation has ever been made; that the capital stock was issued by said corporation to said named persons as consideration of the conveyance by them to the corporation of the assets of the said corporation, consisting of the mining property and the mining equipment and machinery and milling equipment and machinery, as set forth in the debtor's petition for reorganization.

## II.

That there was no preferred stock issued by said corporation and there are no bond holders of said corporation; that there is no mortgage upon any of the property of said corporation, save and except certain liens against specific property, which liens are evidenced by conditional sales contracts.

## III.

That said corporation has been engaged in operating the mining property set forth in its petition, in the North Tempiute mining District, Lincoln County, Nevada; that the chief mineral ore being extracted from said claims is Scheelite or Tungsten, and that said corporation indebtedness was incurred primarily for the purchase and installation of equipment on the premises, both in the mine and mill and development work for developing new bodies of ore.

## IV.

That the following is a list of the obligations of said corporation which have priority under the law:

(A) Claim of the United States for Taxes ..... \$ 47.74

(B) The following claims are secured:

1. Atolia Mining Company, Pacific Mining Co. and P. R. Bradley, Jr., Trustee, Crocker Bank Bldg., San Francisco, Calif. Conditional sale contract..... 6,000.00
2. Atolia Mining Co. Open Acct..... 1,700.00
3. Bank of Nevada, Las Vegas, Nev. Installment contract Diesel Unit..... 2,750.00

(c) The following claims are unsecured:

1. Foster Smith, Mina, Nev..... \$1,365.00
2. Kavanaugh Bros., Tonopah, Nev.... 250.00
3. Hodges Cook Merc., Pioche, Nev... 448.80
4. Walter Ray, Caliente, Nev..... 820.74
5. Van Voriees, Bishop, Calif..... 400.00
6. Clark County Wholesale Merc., Las Vegas, Nev. .... 206.77
7. Lincoln County, Genl. Taxes, 1949. 555.00
8. Thiriot Brothers, Hiko, Nevada....
9. Wesley Koyen, Hiko, Nevada.....
10. G. W. Thiriot, Hiko, Nevada.....
11. Labor Claims Approx..... 5,000.00
12. Gotfredson's Merc., Caliente, Nev... 100.00

13. Union Assay Office, Salt Lake City Utah .....	3.00
14. Bellville, Mina, Nev. ....	23.65
15. Roy Orr, Pioche, Nev. ....	22.00
16. Public Utilities, Caliente, Nev.....	40.50
17. Combine Metals, Pioche, Nev. ....	27.90
18. Ely Valley Mines, Pioche, Nev. ....	6.00
19. Nevada Unemployment .....	35.80
	8.82
20. Standard Oil Co., Bishop, Calif.....	35.65
21. Standard Oil Co., Tonopah, Nevada	41.31
22. Wesley Koyen, Hiko, Nevada .....	57.00

## V.

Mr. George McGuire Pierce, 6057 Maryland Drive Los Angeles, California 36, makes the proposition to pay off the indebtedness of Lincoln Mining Company, Inc., in return for a bond and lease on the property, buildings, machinery, etc., for a period of ten (10) years. A total purchase price of \$150,000.00 payable from royalties at the rate of 10% on net returns to apply on purchase price. A contract to be worked out and executed if sanctioned by the court.

## VI.

Mr. Pierce will place a Bond in Escrow until a decision is rendered in the suit against Atolia Mining Company.

## VII.

We ask that the Honorable Court grant this request. That all costs of administration and all

claims filed and allowed be duly paid, and that then these proceedings be dismissed and the property then be returned to the corporation.

Respectfully submitted,

/s/ G. W. THIRIOT,  
President, Lincoln Mining  
Company, Inc.

[Endorsed]: Filed November 4, 1950. Referee.

[Endorsed]: Filed November 6, 1950, U.S.D.C.

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In the District Court of the United States of America in and for the District of Nevada

In Reorganization  
Chapter X A-60-A

In the Matter of

LINCOLN MINING COMPANY, INC.,

Debtor.

ORDER

It appearing that G. W. Thiriot, President of Lincoln Mining Company, Inc., and holder and owner of fifty per cent (50%) of the capital stock of said company, has filed a proposal for a plan of reorganization other than the plan heretofore approved on the 26th day of September, 1950; that November 10, 1950, has heretofore been fixed as the last day of a time within which creditors and stockholders affected by said plan may accept the same in writing,

Now Therefore, It Is Hereby Ordered that the new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., be considered and treated as a modification of the plan heretofore approved September 26, 1950, and the Court hereby orders such new plan to be filed as such modification, and hereby fixes the 21st day of November, 1950, at 9:30 a.m. as the time, and the courtroom of the United States District Court at Las Vegas, Nevada, as the place for the consideration of such new plan or modification and for the hearing of objections thereto.

Dated: This 6th day of November, 1950.

/s/ ROGER T. FOLEY,  
United States District Judge.

[Endorsed]: Filed November 6, 1950.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING OF  
CLAIMS AND ACCEPTANCES AND FOR  
HEARING OBJECTIONS TO ALTERA-  
TION AND MODIFICATION OF PLAN  
AND FOR CONFIRMATION OF SUCH  
ALTERED PLAN AND FOR NOTICES OF  
HEARINGS THEREON

At Reno, in said District, this 6th day of November, 1950.

It appearing to the Court that the District Judge

did on the 26th day of September, 1950, enter his Order approving plan of reorganization of above-named debtor, and that hearing on such plan was held at Las Vegas, Nevada, on September 1, 1950, and report approved and notices of time set for acceptance of plan by creditors, and stockholders as November 10, 1950; it further appearing that on the 6th day of November, 1950, G. W. Thiriot, president of the debtor corporation, filed a new proposed plan of reorganization which the Judge of this Court ordered filed and treated as a modification of the plan heretofore approved September 26th, 1950, and fixed the 21st day of November, 1950, at 9:30 a.m. as the time and the Court Room of the United States District Court at Las Vegas, Nevada, as the place for consideration of such new plan or modification and for hearing of objections thereto, and it further appearing that additional time should be given to creditors and stockholders to file their claims and acceptances of the plan as altered and modified, now therefore it is

Ordered that a hearing on the plan as modified and altered shall be held November 21, 1950, 9:30 a.m., Courtroom, United States District Court, Post Office Building, Las Vegas, Nevada, to hear objections, if any, to the altered plan, it is

Ordered that creditors and stockholders shall be given until November 18, 1950, to file in the office of the undersigned Referee and Special Master, their claims against the above-named debtor and their acceptances of the altered plans on forms furnished with the order of September 26, 1950, it is

Ordered that any creditor or stockholder who has previously accepted the said plan and who does not file a written rejection of said alteration of plan on or before November 18, 1950, shall be deemed to have accepted the said plan as altered, unless the previous acceptance provides otherwise, it is

Ordered that November 21st, 1950, 9:30 a.m., United States Court Room, Post Office Building, Las Vegas, Nevada, has been fixed as the time and place of hearing for the consideration of the confirmation of the plan for the reorganization of the said debtor, as altered by said alterations, and of such objections as may be made to the confirmation thereof.

/s/ FRANK W. INGRAM,  
Referee and Special Master.

Copy mailed with notices of meetings to Atolia Mining Company, Pacific Mining Company, J. R. Bradley, Jr., Crocker Bank Building, San Francisco, Calif.; George W. Thiriot and Dean P. Thiriot, Cedar City, Utah; Wesley Koyen and Eva Koyen, Hiko, Nevada; Morse and Graves, Esqs., 121 Fremont St., Las Vegas, Nevada; George McGuire Pierce, 6057 Maryland Drive, Los Angeles 36.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause.]

## OFFER TO DEBTOR IN REORGANIZATION

Whereas, the above-named debtor has filed a proposed plan of reorganization, together with a modification thereof, with the Clerk of the above-entitled Court, and

Whereas, the hearing on said proposed modified plan of reorganization has been set for the 21st day of November, 1950, at 9:30 a.m., at the court room of the United States District Court at Las Vegas, Nevada, and

Whereas, said debtor has filed a list of obligations of said corporation with said Court under date of November 6, 1950, and

Whereas, said debtor is desirous of borrowing money sufficient to pay the aforesaid obligations of said corporation, and

Whereas, the undersigned is willing to loan said debtor monies sufficient to pay the aforesaid obligations of said debtor on the following conditions, subject to the approval of this Honorable Court,

Now, Therefore, the undersigned, G. McGuire Pierce, hereby proposes to the said debtor and the above-entitled Court as follows:

(a) To loan said debtor sufficient monies up to but not exceeding the sum of \$10,000.00 to pay the preferred obligations against said debtor, together with all other listed and unsecured obligations in the amounts listed on the aforesaid proposal for reorganization filed with said Court the 6th day of November, 1950.

(b) To assume the secured claims of \$2,250.00 payable to the Clark County Wholesale Mercantile Co., Inc., on a conditional sales contract, in accordance with the terms of said contract, or if said creditor will not proceed under the terms of said conditional sales contract, then this proponent will advance sufficient sums to pay said creditor in full.

(c) To post a surety bond to insure payment to the Atolia Mining Company if and when any net amounts should be determined to be due and owing said Atolia Mining Company from the aforesaid debtor as a result of present pending litigation between the debtor and said mining company.

(d) To accept as security for the payment and/or advance of the sums hereinabove set forth a promissory note executed by said debtor, subject to the approval of the above-entitled Court, said promissory note to be secured by a chattel and realty mortgage on the mining properties, both real and personal, owned by said debtor in Lincoln County, Nevada.

In addition to the foregoing, the debtor shall execute, subject to the approval of the above-entitled Court, a lease and option with the undersigned as Lessee in accordance with the copy of a proposed lease attached hereto, and on the further condition that the debtor shall transfer free and clear to the undersigned as consideration for said transaction 75,000 shares of Treasury Stock now held by said debtor corporation and not having yet been issued, as the sole and separate property of the undersigned.

The undersigned shall have a first claim for and against all royalties due under the lease and option proposed until the undersigned has been repaid all sums advanced to said debtor and/or the aforementioned creditors of said debtor as hereinabove specified; a copy of the proposed lease and option is attached hereto and by reference made a part hereof.

This offer shall be considered as a complete offer in its entirety and no part thereof shall be considered several or separable.

Dated this 21st day of November, 1950.

/s/ G. McGuire PIERCE,

HAWKINS & CANNON,

By /s/ HOWARD W. CANNON,

Attorneys for Proponent.

[Endorsed]: Filed November 21, 1950. Referee.

#### LEASE AND OPTION AGREEMENT

This Lease and Option made the 21st day of November, 1950, between Lincoln Mining Co., Inc., a Nevada Corporation, by and through its duly elected officers, hereinafter referred to as the Lessor, and G. McGuire Pierce, hereinafter referred to as Lessee,

Witnesseth:

Whereas, the Lessor is the owner of certain patented and unpatented mining claims, together with

certain mining machinery and equipment, located within the State of Nevada, and

Whereas, the said Lessor is insolvent and in re-organization under the provisions of Chapter X of the Act of Congress relating to Bankruptcy under the jurisdiction of the District Court of the United States of America, in and for the District of Nevada, and

Whereas, said Lessor is desirous of borrowing monies from said Lessee in sufficient sums to pay certain creditors who have filed and proved claims against said Lessor under the aforesaid Bankruptcy Act and said Lessee is desirous of loaning to said Lessor sufficient sums to pay said creditors, provided, the approval of the District Court of the United States of America, in, and for the District of Nevada, is first had and obtained,

Now, Therefore, in Consideration of the payment of royalties to said Lessor as hereinafter provided, and the loaning by said Lessee to said Lessor of monies as above mentioned, and the covenants and agreements hereinafter expressed, It Is Mutually Agreed by and between said Lessor and Lessee as follows:

I.

The Lessor hereby leases to said Lessee all of those certain patented and unpatented lode mining claims, mines and mining grounds, together with any and all improvements thereon, and appurtenances thereunto belonging, including all buildings, real and personal property, of whatsoever character or description belonging to said Lessor for use in

connection with mining and milling operations, together with all the rights and privileges appurtenant to said premises or in anywise appertaining thereto, including any and all water rights, all being situate in the Tempiute (an unorganized) Mining District, County of Lincoln, State of Nevada, more particularly described as follows:

Name of Claim Patented Claims (U.S. Mineral Survey No. 4760)	Original Notice of Location Recorded Records of Lincoln County, Nevada		Amended Notice of Location, if Any Recorded, Records Lincoln Co., Nev.	
	Book	Page	Book	Page
Dome .....	L-1	384	M-1	211
Grubstake No. 2 .....	L-1	328	M-1	211
Lime Cap .....	L-1	79	M-1	211
Scheelite .....	M-1	6	M-1	209
Scheelite No. 1 .....	M-1	6	M-1	210
Scheelite No. 2 .....	M-1	7	M-1	209
Townsite .....	L-1	402	M-1	212
Townsite No. 1 .....	L-1	402	M-1	207
Townsite No. 2 .....	M-1	7	M-1	213
Townsite No. 5 .....			M-1	207
Claims Held by Location				
Dome No. 1 .....	N-1	209-210		
Dome No. 2 .....	N-1	210-211		
Grubstake No. III .....	L-1	329	N-1	248-249
Grubstake No. IV .....	L-1	329	N-1	249
Grubstake No. V .....	L-1	353	N-1	250
Grubstake No. 6 .....	L-1	353		
Limecap No. 1 .....	L-1	327		
Limecap No. 3 .....	N-1	211-212		
North Contract No. 1 .....	N-1	212-213		
North Contract No. 2 .....	N-1	213		
Pyramid .....	L-1	384	N-1	247-248
Pyramid No. 1 .....	N-1	211		
Scheelite No. 3 .....	M-1	367-368	N-1	200-201
Scheelite No. 4 .....	M-1	367	N-1	201-202
Scheelite No. 5 .....	M-1	368	N-1	250-251
Scheelite No. 6 .....	M-1	369	N-1	251-252
Scheelite No. 7 .....	N-1	213-214		
Scheelite No. 8 .....	N-1	202		
Scheelite No. 9 .....	N-1	203		

Together with the Lessor's interest in and to that certain mining area and property described as the New Deal Area being more particularly described as follows:

That area lying within planes extended vertically downward through the exterior boundaries of what was once known as the New Deal Claim, which boundaries for the purpose of this Agreement are described by metes, bounds, courses and distances as follows:

Beginning at a point on the Grubstake No. 2 Patented Mining Claim, U. S. Mineral Survey No. 4760, marked by a pine stump of 10" diameter, 5.9 feet high and blazed "N.E. Corner New Deal," from which the N.E. corner of the Scheelite Patented Mining Claim, U. S. Mineral Survey No. 4760, bears S 77° 22' W, a distance of 40.28 feet;

Thence running S 6° 40' W, 706.49 feet to the S.E. Corner, a pine stump, 7" diameter, 4.8 feet high, blazed "S.E. Corner New Deal," upon the Scheelite Patented Mining Claim;

Thence running N 67° 26' W, 632.18 feet to a South Side Corner, a pine stump, 7" diameter, 8.5 feet high, blazed "S. Side Center New Deal," upon the Scheelite Patented Mining Claim;

Thence running N 61° 43' W, 417.13 feet, to the S.W. corner, a pine stump, 6" diameter, 5.3' high, blazed "S.W. Corner New Deal," upon the Scheelite No. 8 Unpatented Mining Claim;

Thence running N 18° 50' E, 532.68 feet to the N.W. Corner, a cedar stump 6" diameter, 6.0 feet high, blazed "N.W. Corner New Deal," upon the Townsite No. 2 patented Mining claim;

Thence running S 74° 16' E, 894.56 feet to the N.E. Corner, the point of beginning.

It is Mutually Understood and Agreed, that Lessor's interest in said New Deal Area is a  $\frac{7}{8}$ ths interest only, carrying, however, the right to mine, mill and dispose of the full interest in and to said area, accounting to the owners of  $\frac{1}{8}$ th interest in said area on a royalty payment basis of  $\frac{1}{8}$ th of the royalties thereof. The Lessee herein shall have the full right to mine and operate said New Deal Area paying to the owners of the  $\frac{1}{8}$ th interest a royalty as their interest may appear.

Together with any and all right, title or interest said Lessor may have in and to the Southeast Quarter (SE $\frac{1}{4}$ ) of Section 17, Township 3 South, Range 56 East, M.D.B.&M.

The Term of This Lease is for a period of twenty (20) years, commencing on the 25th day of November, 1950, and continuing to the 24th day of November, 1970, unless sooner terminated as herein provided, with the privilege of renewal for a further period of twenty (20) years. And the privilege of purchasing the said mining property as hereinafter set forth.

## II.

From and after the date of the execution of this

Agreement and during all the time it shall continue in full force and effect Lessee shall be entitled to the sole and exclusive possession of all of said mining property and premises, including said improvements, appurtenances, mining equipment and personal property, and may explore, work, mine develop, and extract metals and minerals from the premises and may remove ores, metals and minerals from the premises in such manner as it may deem advisable and at its sole discretion, but at its own sole cost and expense and with due regard to the safety, development and preservation of said premises as a workable mine, and shall timber all shafts, drifts, tunnels, stopes and other workings where under good mining practice timbering is necessary.

### III.

The Lessors and their agents shall have the right and privilege at all reasonable times to enter upon and into all parts of the premises hereby leased for the purpose of inspecting same, with the right to use all passageways, ropes, windlasses, ladders, hoists, and all other means of ingress and egress for such purposes, providing they do not interfere with the operations of Lessee, and further provided that such entry and inspection shall be at their own risk and hazard and Lessors will hold Lessee harmless from and indemnify it against liability to them or their agents for damages to personal property or for personal injuries arising from any condition of the premises or from any other cause except the wilful misconduct of Lessee or its agents, and fur-

ther provided that Lessee shall not be responsible for the acts or conduct of such agents of Lessor while on the premises.

The Lessee shall perform all work in the nature of mining or development in and upon the mining claims herein described in accordance with the mining laws of the State of Nevada, and in full compliance with the rules and regulations of the Mine Inspector of the State of Nevada.

#### IV.

For the said use and occupation of said premises and the exclusive right to extract and remove metals and minerals therefrom, and to sell the same and retain the proceeds thereof, Lessee shall pay Lessor a rental and/or royalty as follows:

(a) Ten per cent (10%) of the net returns from the sale of all minerals produced from said leased property providing, however, that in computing the net returns any premiums or bonuses received by said Lessee over and above the normal sale price shall be excluded in determining such net returns.

(b) An accounting shall be made on a monthly basis as soon after the 1st of each month as is practicable covering all sales made during the previous month, provided, that payment therefor shall have been received by said Lessee.

(c) All payments made hereunder shall be paid by said Lessee to the credit of said Lessor at the First National Bank of Nevada, Las Vegas Branch, Las Vegas, Nevada.

## V.

The Lessee is hereby given an option and right to buy all of the right, title and interest of the Lessor in and to the hereinabove described claims and property, both real and personal, at any time during the term of this lease or any legal extension thereof, for the total purchase price of \$150,000.00.

It is Mutually Understood and Agreed that any and all royalties shall apply for and against the said purchase price herein specified.

It is Further Understood and Agreed that all monies advanced and loaned to the said Lessor by said Lessee shall be repaid to said Lessee from the first royalties due said Lessor as herein provided, and all such repayments of loans or advances by royalty payments shall apply as credit, for the full amount thereof, for and against the aforesaid purchase price, provided, the Lessee elects to exercise his option.

The Lessor shall, upon the execution of this Lease and its approval by the aforesaid Court, execute a deed to said Lessee of all of the Lessor's right, title and interest, in and to the aforesaid mining claims and personal and real property, said deed to be placed in escrow with the First National Bank of Nevada, Las Vegas, Nevada, with instructions to said bank to deliver said deed to the Lessee when the amount of royalties paid under the provisions of this lease, including all royalties repaid to Lessee on account of the loan hereinabove mentioned from said Lessee to the Lessor, including

principal and interest thereon, shall equal the aforesaid purchase price of \$150,000.00.

## VI.

The Lessee may, but is not required under the provisions of this Lease, to treat the mill tailings developed from the processing of ores, provided, if the Lessee shall elect to treat said tailings, the royalties shall be paid to said Lessor on the same basis as primary ores as above specified.

It is Further Understood and Agreed that the Lessee is hereby given the right to treat ores from properties other than that of the Lessor, provided, that should said other ores be commingled with the ores from Lessor's property, accepted principles of weighing and sampling will be maintained. The Lessee shall have the full right to commingle tailings of ores of other properties than those covered by this agreement with the tailings from said properties hereinabove described.

## VII.

Upon extraction of ores and saleable products from said premises, title to the severed materials shall immediately pass to Lessee and it shall thereupon have the right to sell and dispose of the same and pass full title thereto to the purchaser or purchasers thereof, and Lessee agrees to market any and all products to the best joint interests of Lessor and operator, but at its sole discretion as to time, place, conditions and sales prices.

## VIII.

All equipment, tools, machinery, structures, improvements, and personal property of every nature and description hereafter bought or otherwise acquired and maintained or brought or installed or placed upon or within said premises by Lessee during the term hereof shall not be nor become fixtures, but shall remain the property of Lessee, whether affixed to the premises or not, and subject to removal by it at any time; and upon the expiration of the term hereof or the sooner termination of this lease as herein provided Lessee shall have the right to remove all of said equipment, tools, machinery, structures, improvements and personal property at any time within 90 days after the said expiration or sooner termination of this lease. It is understood, however, that this right of removal shall not extend to the dismantling and removal of any underground timbers, structures or improvements supporting any underground portions of said mine still workable and accessible for further underground mineral extraction, nor to the removal of timbers of the main shaft, nor to the removal of rails, air or water pipe installed in the main shaft, regardless of who made or makes such installation.

The right to removal herein provided is conditioned upon the payment or adequate provision for the payment by Lessee of all royalties and taxes due or accrued hereunder to the date of termination.

## IX.

The Lessee shall perform the annual labor required by law to retain possession of the unpat-

ented claims and file the same as required by law. A copy thereof shall be furnished to said Lessor fifteen (15) days in advance of the actual filing thereof.

#### X.

Lessee shall at all times keep all bills and accounts for labor, supplies and materials done, performed or furnished to, for or upon the premises promptly paid. It is further agreed that during the time that this lease is in force and effect no party hereto, without the consent of the others, shall place or cause to be placed any lien, mortgage or incumbrance of any kind or character against the properties.

#### XI.

The Lessee further agrees that it will pay all State and County taxes lawfully levied upon the net proceeds of mines, where such proceeds result from the production and sale of ores from Lessee's mining operations upon the ground herein leased, including the amount of such tax which may be payable, if any, upon any share of such proceeds which may be paid to Lessor by way of royalty or royalties, if any, up to but not exceeding the amount of such taxes calculated at a rate up to five Dollars (\$5.00) per hundred of actual assessed valuation and lawful levy; any taxes lawfully due from and payable by Lessor arising from a tax rate in excess of \$5.00 per hundred shall be borne and paid by Lessor.

Lessee further agrees that it will not allow or permit any miner's, materialmen's, labor or other

liens to be filed or attached against the property herein described or against this leasehold estate.

Lessee agrees that it will permit Lessor to post and to thereafter keep posted in a conspicuous place on said premises, a notice to the effect that Lessor will not be responsible for any labor performed, materials furnished, or improvements made by the Lessee under this lease; and further, that the Lessee will before employing one or more persons in or upon the premises, or in connection with any work under this lease, accept and at all times thereafter comply with the terms, provisions and conditions of the Nevada Industrial Insurance Act, and pay all premiums and make all reports required by the Nevada Industrial Commission.

### XII.

Lessee shall also comply with all the provisions of the State and Federal Social Security Acts and the Unemployment Compensation Laws, and shall make all reports, returns and payments required by such acts and laws and shall at all times indemnify and hold Lessors harmless of and from any and all claims and demands which could or might arise against Lessors under and by virtue of any of said laws or acts arising out of Lessee's operations.

### XIII.

Lessee shall at all times keep true and accurate books of account, mine and mill records and records showing the amount of all ore mined, milled and/or shipped and all costs of reduction and sale and all amounts received therefor, and shall make and keep

maps showing all workings and make all reports as may be required by law or rules or regulations of any governmental authority, keeping copies thereof. All such books, records, reports and maps shall at all reasonable times be open to the inspection of Lessor, or any of them, their agents, auditors and attorneys, provided that only those cost records which become public property under the Nevada net proceeds tax laws shall be open to such inspection, and no other cost records.

#### XIV.

The Lessee shall have the right to terminate this lease at any time by giving to Lessor notice to that effect at least sixty (60) days prior to the date of such contemplated termination, and Lessee shall also at the time of giving notice file and record in the office of the County Recorder of said Lincoln County an executed copy thereof, and a duly executed and acknowledged relinquishment of this lease and of all of the rights of Lessee hereunder. Upon such termination Lessee shall cease to be liable or responsible for any future payments or expenditures, other than those current bills, taxes, levies and statutory charges which shall have accrued as of the date fixed for such termination, and shall have ninety (90) days' additional time to dismantle and remove all equipment, machinery, supplies, etc., removable under the terms hereof.

#### XV.

It is mutually agreed, covenanted and understood between the parties hereto, that each and every

clause, conditions, covenant and agreement hereof shall bind and inure to the benefit of the respective heirs, executors, administrators, legal representatives, successors and assigns of each of the parties hereto.

It is the express agreement and understanding of the parties hereto, that this lease may be assigned and transferred by the Lessee to such other person, firm or corporation as it may elect, the only obligation in the event of such assignment being to notify Lessor in writing of the name and address of the assignee.

## XVI.

The Lessor covenants, promises and agrees to and with the Lessee, that said Lessee, keeping and performing all of the terms, conditions, and covenants herein contained on its part to be kept and performed, shall and may lawfully, peacefully and quietly have, hold, use, occupy and possess the premises hereby leased for and during the term hereof without any let, suit, hindrance, eviction, ejecting, molestation or interruption whatsoever of or by Lessor or any other person or persons whatsoever lawfully claiming or to claim, by, from or under them or any of them.

## XVII.

Lessor hereby gives and grants to Lessee the exclusive right, privilege, and option to extend the term of this lease for an additional period of twenty (20) years from the date of the expiration hereof provided the lease is then in full force and

effect. Such option, if exercised, shall be exercised not later than May 24, 1970, and not earlier than January 1, 1970, and shall be exercised by written notice to that effect from Lessee to Lessor.

### XVIII.

It is understood and agreed between the parties hereto that the rights and obligations of the Lessor hereunder are joint and several.

### XIX.

It is mutually understood and agreed that the execution and performance of the terms and conditions of this lease shall be first dependent on the approval of the United States District Court, in and for the District of Nevada.

In Witness Whereof, the parties hereto have set their hands and seals this 21st day of November, 1950.

[Seal]

LINCOLN MINING CO., INC.,  
A Nevada Corporation,  
Lessor.

By /s/ G. W. THIRIOT,  
President.

By /s/ EVA KOYEN,  
Sec., Vice-President.

/s/ G. MCGUIRE PIERCE,  
Lessee.

State of Nevada,  
County of Clark—ss.

On this 21st day of November, 1950, personally appeared before me, a Notary Public in and for said County and State, G. W. Thiriot and Eva Koyen, Sec., known to me to be the President of the Corporation that executed the foregoing instrument, and upon oath, did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said Corporation and that the seal affixed to said instrument is the Corporate Seal of said corporation; that the signatures to said instrument were made by officers of said Corporation as indicated after said signatures; and that the said Corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

[Seal]      /s/ HAROLD M. MORSE,  
                    Notary Public in and for  
                    Said County and State.

My commission expires Dec. 20, 1950.

Attest:

.....  
Secretary.

State of Nevada,  
County of Clark—ss.

On this 21st day of November, 1950, personally appeared before me, a Notary Public in and for said County and State, G. McGuire Pierce, known

to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

[Seal]      /s/ HAROLD M. MORSE,  
Notary Public in and for  
Said County and State.

My commission expires Dec. 20, 1950.

Approved:

.....

[Endorsed]: Filed November 21, 1950, Referee.

[Endorsed]: Filed November 29, 1950, U.S.D.C.

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[Title of District Court and Cause.]

AN AMENDED OFFER TO DEBTOR IN  
REORGANIZATION

Whereas, the undersigned filed a proposed offer to debtor in reorganization in the above-entitled matter with the Referee in Bankruptcy on the 21st day of November, 1950, and

Whereas, Paragraph "c" of said offer was not acceptable to the Atolia Mining Company, holders of conditional sales contracts with the above-named debtor, and

Whereas, the undersigned in open court proposed a substitution for the aforesaid Paragraph "c" and wishes to reduce said proposal to writing;

Now, Therefore, the undersigned, G. McGuire Pierce, proposes in lieu of the aforesaid Paragraph "c" in his offer to debtor in reorganization filed with the above-entitled court on November 21, 1950, the following:

"(c) To pay to said Atolia Mining Company the sum of \$7,700.00 as payment in full of all sums due said company under conditional sales contracts, open accounts, or otherwise, from the above-named debtor, or the stockholders of said debtor, it being understood that this shall constitute settlement in full of all claims between said parties, exclusive of those matters now in litigation in the Seventh Judicial District Court in the case of Koyen and Thiriot, et al., vs. Atolia Mining Company, et al.; payment of said sums shall be made as follows:

The sum of \$2,500.00 cash upon the approval of this proposed plan by the above-entitled court; the balance to be paid at the rate of \$300.00 or more per month, commencing with the first day of the month after approval of this plan by the above-entitled Court, and continuing on the first day of each and every month thereafter until the balance in the sum of \$5,200.00, together with interest at the rate of 6% per annum shall have been paid in full.

It Is Further understood and Agreed that the payment of the balance shall be secured by a conditional sales contract or a note executed by the proponent hereof secured by a chattel mortgage."

Dated this 22nd day of November, 1950.

G. McGUIRE PIERCE,

By /s/ HOWARD W. CANNON,  
Attorney at Law.

HAWKINS & CANNON,

By /s/ H. W. CANNON,  
Attorneys for Proponent.

[Endorsed]: Filed November 27, 1950, Referee.

[Endorsed]: Filed November 29, 1950, U.S.D.C.

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[Title of District Court and Cause.]

## FINDINGS AND REPORT OF REFEREE

The continued hearing required by Sections 161 and 170 of the Bankruptcy Act and the proposed plan approved by the Court on the 26th day of September, 1950, and the proposed modification of such plan approved by the Court November 6th, 1950, and setting November 21st, 1950, for hearing any objections to such altered plan and as so modified hearing on acceptances to such plan by the creditors and stockholders before the Referee and Special Master, Frank W. Ingram, for report and proposed orders: the debtor being represented by Morse and Graves, Esqs., of Las Vegas, the Atolia Mining Company, et al., a listed creditor, being represented by J. Howard Gray of Ely, Nevada; the proposed lessee G. McGuire Pierce, being represented by Hawkins & Cannon, Esqs., of Las Vegas,

all of the stockholders being present in person, and several creditors, the stockholders having filed their acceptances to altered plan for 100% of all outstanding stock and 72% of the creditors whose claims were filed and allowed within the time extended by the Court (Exhibit A attached) and no objections to the plan having been made at such hearings and the lessee having made an offer to purchase the property of the bankrupt and the bankrupt having entered into a contract to lease and option to sell subject to the approval of this court (original lease and option attached) and there being no adverse interest represented at such hearing.

The Referee and Special Master having considered the files and records in this case and the testimony of the several witnesses respectfully recommends as his findings:

(1) That due notice of said hearings of November 21, 1950, was given according to the orders of the Judge of this Court and certificate of mailing to all creditors, stockholders and others interested are in the records of the Referee.

(2) That claims filed and acceptances filed and allowed are those provided for in the order of the Judge of the Court dated September 21st and November 6th, 1950, and are listed in Exhibit A attached.

(3) That 100% of all outstanding stock accepted altered and modified plan and 72% of the amount of claims filed and allowed accepted altered plan.

(4) That objections to other claims were filed by the debtor and have been noticed for hearing on December 15, 1950, at Las Vegas the objections being that such claims had never been audited by the debtor and were before corporate organization on September 27, 1949.

(5) That G. McGuire Pierce submitted an option to purchase on lease terms the property of the debtor for the sum of \$150,000.00 and to loan the debtor the sum of \$10,000.00 to pay off listed creditors in full receiving payment of loan from royalties according to the terms of an agreement dated November 21, 1950, attached hereto and subject to the approval of the Judge of this Court.

(6) That by the terms of the offer of G. McGuire Pierce he also agreed to pay to the Atolia Mining Company, et al., the sum of \$7,700.00 assuming a conditional sales contract in full settlement of any claims of Atolia Mining Company, now before this Court on reclamation petition, against the estate and any prior claims against the present stockholders prior to corporate organization on September 27, 1949.

(7) That by the terms of the offer of G. McGuire Pierce he would assume and pay the secured claim of the Clark County Wholesale Mercantile Company, Inc., on conditional sales contract in the amount of \$2,250.00.

(8) That at such hearing the said G. McGuire Pierce offered to modify his offer to paragraph (c) substituting payment for security bond in pay-

ment of Atolia Mining Company's claim (Finding 6 above) which was accepted by Atolia conditioned upon the Judge of this Court approving offer, agreement and plan and consenting to continuing its petition to reclaim machinery now on bankrupt's property and claimed by petitioner to have never been assigned to debtor.

(9) The offer of Pierce and the corporate acceptance in form of agreement is just and equitable, will provide for payment of creditors, and is proposed by all stockholders at stockholder and directors meeting at Las Vegas on November 21, 1950, and the order attached as prepared by the parties may be signed ex parte as all have had copies.

(10) That the plan has been accepted by the requisite number in amount of creditors and stockholders without objection and complies with the provisions of Section 216 of the Act of Congress regarding bankruptcy and the Referee recommends that the Judge should designate the 15th day of December, 1950, at Las Vegas, Nevada, U. S. Courtroom, 9:30 a.m., as the time and place for consideration of the confirmation of the plan and of such objections as may be made to the confirmation as provided in Section 179 of said Act.

(11) That the priority claim of the United States Treasurer will be paid in full from funds deposited upon approval of offer, agreement and altered plan and therefore time may be properly shortened for notice: That the Securities and Ex-

change Commission has advised this Court that there is no public stock interest and they are not participating in the proceedings.

(12) That a time should be fixed for filing any expenses of operation since petition, for costs of administration and hearings thereon

Dated at Reno, this 28th day of November, 1950.

Respectfully submitted,

/s/ FRANK W. INGRAM,

Referee and Special Master.

Lincoln Mining Company Inc. A-60-A

Claims Filed and Allowed on Order of Court of September 26th, 1950, Up to and Including November 18, 1950, Subject to Objection of Creditors or Stockholders for Purpose of Section 179

Claim No.	Name and Address	Amount	Accepted
1.	Collector of Internal Revenue (Priority) .....\$ 47.74 Reno, Nevada	47.74	
2.	John A. Kaze..... 351.61 Alamo, Nevada	351.61	\$ 351.61
3.	W. W. Showalter..... 657.62 Hiko, Nevada	657.62	657.62
4.	Duplicate to Claim 10.		
5.	Duplicate to Claim 2.		
6.	Employment Security Dept... 52.96 Carson City, Nev. (Priority)	52.96	
7.	Employment Security Dept... 45.34 Carson City, Nev. (Priority)	45.34	
8.	Hodges-Cook Merc. Co. .... 448.80 Pioche, Nevada	448.80	448.80
9.	Ely Valley Mines, Inc. .... 6.00 Pioche, Nevada	6.00	
10.	Charles E. Priester..... 186.67 Tonopah, Nevada	186.67	186.67
11.	E. H. Snyder..... 43.16 218 Felt Bldg. Salt Lake City, Utah	43.16	
12.	Grant A. Wadsworth..... 338.64 P.O. Box 121 Panaca, Nevada	338.64	338.64

Claim No.	Name and Address	Amount	Accepted
13.	Walter A. Ray, Box 278..... Caliente, Nevada	820.74	
14.	Caliente Public Utilities..... Caliente, Nevada	78.42	
18.	B. W. VanVoorhis Jr. .... P.O. Box 1011 Bishop, California	580.00	
19.	Foster Smith, Box 88..... Carson City, Nevada	1,365.00	1,365.00
20.	Eva Koyen ..... Hiko, Nevada	1,327.87	1,327.87
21.	Golfredson's .....	113.87	
22.	O. H. Gulack, Box 15..... Little Lake, Calif.	813.11	813.11
23.	Standard Oil Co. Calif. .... Box 88, Laws, Calif.	35.65	
26.	Orland McDowell .....	163.35	163.35
	P.O. Box 626 Tonopah, Nevada		
27.	Delworth Wooley .....	214.90	214.90
	Manti City, Utah		
28.	Rylon Chaffin .....	15.42	15.42
	P.O. Box 128 Eddyville, Kentucky		

Total amount claims filed, approved  
and percentage—72% plus .....\$7,981.87      \$5,882.99

Objections [none].

Claims Filed and Objected to Giving Objector.  
Subject to Hearings

Claim No.	Creditor & Address	Amt.	Objections by	Plan
15.	Thiriot Bros. .... Hiko, Nevada	\$4,559.60	Debtor	Accepted
16.	G.W. Thiriot .....	1,769.10	Debtor	Accepted
	Tem Piute Hiko, Nevada			
17.	Dean P. Thiriot..... Panaca, Nevada	1,664.16	Debtor	Accepted
25.	Wesley Koyen .....	7,085.77	Debtor	Accepted
	Hiko, Nevada			
24.	Morse & Graves, Esq... Las Vegas, Nevada	2,500.00	Referee*	Accepted

\* Not itemized according to Rule 13.

Stockholders Representing All Outstanding Stock Accepted  
Plan as Modified

Name and Address	Shares of Stock
1. Eva H. Koyen .....	56,250
Hiko, Nevada	
2. Wesley Koyen .....	56,250
Hiko, Nevada	
3. Dean P. Thiriot .....	56,250
Hiko, Nevada	
4. G. W. Thiriot, Hiko, Nev. .....	56,250
	_____
Total stock and percentage.....	225,000 100%
Total capital stock .....	300,000 shares
Remaining in treasury.....	75,000 shares

Plan and agreement provides for issuing this remaining stock to  
G. McGuire Pierce.

[Endorsed]: Filed November 29, 1950.

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In the District Court of the United States of  
America, in and for the District of Nevada

In Reorganization A-60-A

In the Matter of  
LINCOLN MINING COMPANY, INC.,  
Debtor.

**ORDER APPROVING OFFER AND PLAN OF  
REORGANIZATION**

A hearing having been held on the 21st and 22nd days of November, 1950, before the Referee and Special Master, Frank W. Ingram, pursuant to order of this Court dated the 6th day of November, 1950, on the modified plan for the reorganization of the Lincoln Mining Co., Inc., the above-named debtor, and for the consideration of any objections

which might be made, or of such amendments or plans as might be proposed by said debtor or by any creditor or stockholder herein, and notice of said hearing having been given as required by Section 171 of the Act of Congress relating to bankruptcy, and an offer to debtor in reorganization having been prepared and filed with said Court by G. McGuire Pierce in accordance with the proposed modified plan of reorganization and an amended offer to debtor in reorganization made by the said G. McGuire Pierce in open court, and it appearing to the Court that such offer to debtor in reorganization and amended plan of reorganization complies with the said bankruptcy act and is fair and equitable and feasible.

It Is Therefore Ordered that the offer to debtor in reorganization as amended made to the above-entitled debtor by G. McGuire Pierce be, and it is hereby, approved, and

It Is Further Ordered that the Lease and Option between the debtor, Lincoln Mining Company and G. McGuire Pierce be, and it is hereby approved, and the said debtor and the Lessee therein are hereby authorized to proceed in accordance with the terms of the said lease.

It Is Further Ordered that the said G. McGuire Pierce pay to said Atolia Mining Company the sum of \$7,700.00 as payment in full of all sums due said company under conditional sales contracts, open accounts, or otherwise, from the above-named debtor or the stockholders of said debtor, exclusive of those matters now in litigation in the Seventh

Judicial District Court in the case of Koyen and Thiriot, et al., vs. Atolia Mining Company, et al., on the terms and conditions set forth in the amended offer to debtor in reorganization.

It is Further Ordered that the said G. McGuire Pierce deposit the sum of \$10,000.00 in the First National Bank of Las Vegas, Nevada, in trust for the purpose of paying the preferred and unsecured obligations of said debtor corporation and listed in the proposal for reorganization filed with this court on the 6th day of November, 1950; provided, the said claims shall not be paid without first securing the approval of this Court and without the stockholders having an opportunity to object thereto.

It is Further Ordered that said G. McGuire Pierce assume the secured claim of \$2250.00 payable to the Clark County Wholesale Mercantile Company, Inc., in accordance with the terms of said conditional sales contract.

It Is Further Ordered that in consideration of said offer and amended offer to debtor in reorganization that the Lincoln Mining Company, Inc., by and through its duly authorized officers execute a certificate for 75,000 shares of Treasury Stock now held by said debtor corporation to the said G. McGuire Pierce as his sole and separate property.

It Is Further Ordered that said Lincoln Mining Company, Inc., execute its note payable to the said G. McGuire Pierce for the sums of money advanced by said G. McGuire Pierce to said debtor corporation in accordance with the terms of this order, together with such additional sums that may be ad-

vanced by said G. McGuire Pierce, as provided in said offer and amended offer to debtor in reorganization, and that said note be secured by a chattel and realty mortgage on the mining properties, both real and personal, owned by said debtor corporation in said Lincoln County, Nevada.

It Is Further Ordered that the said G. McGuire Pierce shall have a first claim for and against all royalties due under the Lease and Option herein approved by this Court until said Lessee has been repaid all sums advanced to the said debtor, Lincoln Mining Company, Inc., or its creditors.

Dated this 28th day of November, 1950.

/s/ ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed November 29, 1950.

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[Title of District Court and Cause.]

**ORDER FIXING HEARINGS ON CONFIRMATION OF PLAN AND DISMISSAL OF PROCEEDINGS OR ADJUDICATION AND PROVIDING FOR NOTICE THEREOF**

At Reno, in said district on the 28th day of November, 1950.

The report and findings of the Referee and Special Master of the above-named debtor having been filed herein recommending that a time be fixed for the hearing for the consideration of the con-

firmation of the plan for the reorganization of the said debtor, approved by this Court under Section 174 of the Act of Congress relating to bankruptcy on the 28th day of November, 1950, to fix a hearing under Section 236 (c) of said Act, and to designate that notice thereof shall be given in the form and manner proposed in said report, and it further appearing that at the hearing held at Las Vegas, Nevada by the Referee and Special Master 100 per cent of the stockholders and 72% of the creditors, whose claims had been filed, accepted the modified plan of reorganization, and it further appearing that the claim of the United States government in the amount of forty-seven dollars and seventy-four cents (\$47.74) is to be paid immediately from money deposited under the plan and it will be unnecessary for the Court to delay the time of hearing for the notice to the Secretary of Treasury, and it further appearing that the Security and Exchange Commission has filed notice that there is no public stock interest involved in these proceedings and they need not be notified, and no one appearing in opposition thereto and the matter being one upon which an order should be entered forthwith;

Now upon the report and findings of the Referee and Special Master adopted as the findings of this Court and all proceedings had before me, and it appearing that said plan has been accepted as required by Section 179 of the said Act, it is

Ordered that December 15, 1950, 9:30 a.m., United States District Court Room, Post Office Building, Las Vegas, Nevada, be, and it hereby is, fixed as

the time and place (a) of a hearing for the consideration of the confirmation of the plan for the re-organization of the Lincoln Mining Company, Inc., the above-named debtor, approved by this Court under Section 174 of the Act of Congress relating to bankruptcy on the 28th day of November, 1950, and such objections as may be made to the confirmation thereof; and (b) of a hearing pursuant to Section 236(2) of the said Act, if confirmation of the said plan is refused; and in the event of such refusal of confirmation, after said hearing or any adjournment thereof, an order will be entered either adjudging said debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceeding under Chapter X of the said Act, as in the opinion of the Judge may be in the interests of said stockholders and creditors; and it is further

Ordered that the Referee and Special Master shall hold the hearings at the time and place above designated as provided in the General Order of Reference, filed March 22, 1950, and make report, findings and attached proposed order; it is further

Ordered that the said Referee and Special Master shall set down for hearing objections to claims filed in this proceeding at the same time and place and give creditors notice of such hearing on objections to allowance of claims; it is further

Ordered that the Referee and Special Master shall forthwith upon the approval of this order mail the following notice to creditors and stockholders of said debtor as the same may appear upon the records of his office, and to the following, Morse and Graves,

Esq., Las Vegas, Nevada, attorneys for lessees; G. McGuire Pierce, 6057 Maryland Drive, Los Angeles 36, California; Atolia Mining Company, Crocker Bank Building, San Francisco, Calif.; Howard Gray, Esq., Ely, Nevada; Bank of Nevada, Las Vegas, Nevada; Secretary of the Treasury, Washington, D. C.; Securities and Exchange Commission, 930 Sansome St., San Francisco 5, Calif.

Notice of Hearing under Sections 179 and 236(2).

In the District Court of the United States for the  
District of Nevada

No. A-60-A

In Proceedings for the Reorganization  
of a Corporation

In the Matter of  
**LINCOLN MINING COMPANY, INC.,**  
Debtor.

To all Creditors and Stockholders and Other Parties  
in Interest:

Notice Is Hereby Given that December 15, 1950,  
at 9:30 a.m., United States District Court Room,  
Post Office Building, Las Vegas, Nevada, has been  
fixed as the time and place (a) of a hearing for  
the consideration of the confirmation of the plan  
for the reorganization of the Lincoln Mining Com-  
pany Inc., the above-named debtor, approved by  
this Court on November 28th 1950, under Section  
174 of the Act of Congress relating to bankruptcy,

and of such objections as may be made to the confirmation of such plan; and (b) of a hearing pursuant to Section 236(2) of the said Act if confirmation of the said plan is refused.

Notice Is Further Given that in the event of the refusal of confirmation of the said plan, after such hearing under Section 236(2) of the said Act or any adjournment thereof, an order will be entered either adjudging said debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the Act of Congress relating to bankruptcy, or dismissing the proceedings under Chapter X of the said Act, as in the opinion of the Judge may be in the interests of the creditors and stockholders of the said debtor.

Notice Is Further Given that the said hearings may be adjourned from time to time without notice to the debtor, creditors, stockholders, intervenors or other parties of interest other than the announcement of the adjourned date or dates at the hearings.

By Order of the Court.

Dated Reno, Nevada, November 28th, 1950.

/s/ FRANK W. INGRAM,  
Referee and Special Master.

/s/ ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

REFEREE AND SPECIAL MASTER'S REPORT ON OBJECTIONS TO CONFIRMATION OF PLAN BY DEBTOR CORPORATION AND REPLY TO OBJECTION BY G. McGuire PIERCE, LESSEE, AND FINDINGS THEREON

The Judge of this Court having heretofore on the 22nd day of March, 1950, entered his general order of reference to the undersigned, Frank W. Ingram, as Referee and Special Master to hear, determine and report on all matters in the above-entitled reorganization proceedings, and thereafter after appropriate hearings under Sections 161 and 170 of the Act of Congress relating to bankruptcy approved the altered and modified plan of reorganization in its order of November 28th, 1950, as provided in Section 179, approved the offer of a lease and option for the operation of the property and the payment of all outstanding approved claims of creditors as proposed in the lease and offer and the settlement of petition to reclaim certain personal property owned by the Atolia Mining Company, et al., against certain stockholders and fixed a time and place for a hearing on the confirmation of the plan or objection thereto under Section 174, before the Referee and Special Master at Las Vegas, Nevada, on December 15, 1950, and to report, make findings and attach proposed order to such findings, that upon the 15th of December, 1950, the Referee and Special Master in pursuance to the said order

conducted such hearing, at which hearing there appeared Morse and Graves, Esqs., of Las Vegas, Nevada, attorneys for the debtor corporation, who filed an objection in writing at the time of said hearing to the confirmation of the plan attached hereto; Howard Cannon Esq., of Hawkins and Cannon, Esqs., of Las Vegas, Nevada, representing the lessee, G. McGuire Pierce, who filed a reply to the objection of the debtor filed in open Court and which reply is attached hereto; J. Howard Gray, Esq., of Ely, Nevada, who appeared for Atolia Mining Company, et al., and who advised the Court that he was prepared to offer releases and satisfactions of the claims of his client to their claims in reclamation against the stockholders of the debtor corporation as set out in the order approving plan dated November 28, 1950. That notice of hearing for confirmation of plan was sent to all creditors, stockholders, and others interested as required in the general order of reference, the order of this Court dated November 28, 1950, and the Act of Congress relating to bankruptcy and that no objections were filed in writing by any stockholder, creditor or other interested person except as indicated above by the debtor corporation.

Wherefore, the Referee and Special Master reports and recommends the following as his findings and recommends their adoption and approval:

1. That due notice of hearing on confirmation of the altered and modified plan of reorganization, setting December 15, 1950, at the United States

Court Room, Post Office Building, Las Vegas, Nevada, before the Referee and Special Master as provided in the order of the District Judge, dated November 28, 1950, was given to all creditors, stockholders and other interested persons as provided in Section 179 of the Bankruptcy Act.

2. That no written objections to the confirmation of the plan was filed by any creditor, stockholder or other person interested save and except the written objection of the debtor corporation attached hereto.

3. That the debtor corporation having submitted the plan and approved the alterations, and modifications of such plan at previous hearing and filed no objections to the report of Referee and order of the Court within the time authorized by the order of reference, and having accepted the offer of G. McGuire Pierce in open Court on the hearing on approval of plan and executed a lease and option which was approved by the District Judge on November 28, 1950, and the Atolia Mining Company, et al., relying upon the acceptance of the debtor of its plan proposed and accepted as modified in hearing at Las Vegas on November 21 and 22, 1950, having tendered in Court the settlement agreements on their claim to reclaim their property and the lessee, G. McGuire Pierce, advising the Court that they were prepared to and had arranged settlement of claims of secured creditors and would deposit the \$10,000.00 in trust for the immediate payment of all approved claims of creditors and made tender

of such amounts and agreements at the hearing on confirmation held December 15, 1950. The Referee finds that the objection of the debtor corporation, attached hereto, does not offer the creditors or the stockholders any firm offer more advantageous than the approved plan adopted by the Court and will only further delay the satisfaction of the claims of creditors and will delay the commencement of the operation of the property which is a strategic tungsten producer needed in the present national crisis.

4. Wherefore, the Referee and Special Master recommends that the Court, by an appropriate show-cause, fix a hearing time and plan for the determination of why the plan approved by this Court should not be confirmed notwithstanding the objections of the debtor corporation.

5. The Referee and Special Master certifies that a copy of this report and findings has been sent to the parties represented at the hearing, namely Morse & Graves, Esqs., representing the debtor; Howard Cannon, Esq., representing the lessee, G. McGuire Pierce, and J. Howard Gray, Esq., representing Atolia Mining Company, et al., petitioner in reclamation.

/s/ FRANK W. INGRAM,  
Referee in Bankruptcy.

[Title of District Court and Cause.]

OBJECTIONS BY LINCOLN MINING COMPANY, INC., A CORPORATION, DEBTOR,  
TO APPROVAL OR CONFIRMATION OF  
THE ALTERED AND MODIFIED PLAN  
OF G. McGuire PIERCE

To: The Honorable Roger T. Foley, Judge of the  
District Court of the United States, in and for  
the District of Nevada:

Comes Now, Lincoln Mining Company, Inc., a corporation, and files herein its written objections to the acceptance or confirmation of the altered and modified plan heretofore submitted herein and the proposed lease of G. McGuire Pierce, and respectfully represents to this Honorable Court as follows, to wit:

I.

That on or about the 6th day of November, 1950, a proposed modification of the plan of reorganization for this corporation was approved by this Court and by Order of this Court the hearing on said approval was set for November 21, 1950, at 9:30 o'clock a.m., in the Federal Building, at Las Vegas, Nevada; that the modification of the original plan for reorganization was filed herein by G. W. Thiriot, President of Lincoln Mining Company, Inc., and that included therein as Paragraph V is the following:

“Mr. George McGuire Pierce, 6057 Maryland Drive, Los Angeles, California 36, makes the

proposition to pay off the indebtedness of Lincoln Mining Company, Inc., in return for a bond and lease on the property, buildings, machinery, etc., for a period of (10) ten years. A total purchase price of \$150,000.00 payable from royalties at the rate of 10% on net returns to apply on purchase price. A contract to be worked out and executed if sanctioned by the Court."

And that in the Order of Court referred to, noticing the hearing for consideration of said modified plan, said modification was summarized as follows:

"That George McGuire Pierce offers to pay off all indebtedness of the debtor company in return for a bond and lease upon the debtors property for a period of ten years. A total purchase price of \$150,000 payable from royalties on net returns to apply to purchase price. Plan if approved by creditors and stockholders to be followed by contract sanctioned by Court. Bond in escrow to cover liability in suit against Atolia Mining Company."

## II.

That at the time and place set for the consideration of said modified plan the said George McGuire Pierce, without prior notice to the corporation or its officers or stockholders or any of the creditors of the corporation, altered and amended his proposal, which alteration is briefly summarized as: The said corporation be directed to issue 75,000 shares of its capital stock, held and unissued by

said corporation as Treasury Stock, to the said George McGuire Pierce, with no further or added consideration than his original proposal made to George W. Thiriot, president of this corporation; that a lease had been prepared on the mining property, the property of this corporation, by the attorneys representing the said George McGuire Pierce, and was presented to the officers of this corporation for their signatures on said date; and that the said George McGuire Pierce would pay in cash to the Atolia Mining Company the sum of \$7700.00 to secure a full release from said company of all of their claims against the debtor corporation; that present at said court hearing were all the officers and directors of the debtor corporation, and as they were then and there informed by the said George McGuire Pierce that the lease he had drawn and his altered proposal were final insofar as he was concerned, the said officers and directors of said corporation and its stockholders, therefore, accepted said alteration of said modified plan, but that they acted hurriedly and they were at that time of the firm opinion that said alteration and modification so proposed was not for the best interest of the corporation, its stockholders and its creditors.

### III.

That subsequent to the hearing aforesaid on the 21st day of November, 1950, at Las Vegas, Nevada, the officers and directors of the debtor corporation have secured sufficient funds to pay and liquidate all of its creditors, and are now prepared to do so.

and that by said arrangement the property rights of the stockholders will be protected, the assets of the corporation preserved, and all of its creditors paid.

#### IV.

The debtor corporation respectfully represents to this Honorable Court, therefore, that it be directed by appropriate order of this court to pay and discharge its indebtedness to each, every one and all of its creditors, within a time to be prescribed by Order of this Honorable Court, and to file herein receipts evidencing such payment, and that thereupon these proceedings be dismissed and the property returned to the debtor corporation, and that the lease heretofore entered into herein with George McGuire Pierce be not confirmed, but on the contrary that the same be declared null and void.

Wherefore, Lincoln Mining Company, Inc., a corporation, prays that it be ordered by appropriate order of this Court to pay and discharge its creditors within a time to be fixed by Order of this Court, and that proper receipts be filed with this Court, evidencing such payment; that the proposed lease of the said George McGuire Pierce be not confirmed, but be declared null and void; that these proceedings be dismissed and all of the assets of the corporation be returned to the corporation.

JOHN S. HALLEY, and  
MORSE & GRAVES,

By /s/ HAROLD M. MORSE,  
Attorneys for Lincoln Mining Company, Inc., a  
Corporation.

State of Nevada,  
County of Clark—ss.

George W. Thiriot, being first duly sworn on oath, deposes and says:

That he is the president of Lincoln Mining Company, Inc., a corporation, debtor in the foregoing entitled cause; that he is making this verification for and on behalf of said corporation; that he has read the foregoing Objections to Approval or Confirmation of the Altered and Modified Plan of G. McGuire Pierce and knows the contents thereof, and that the same is true of his own knowledge, except as to any matters therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ G. W. THIRIOT,  
President.

Subscribed and sworn to before me this 15th day of December, 1950.

[Seal] /s/ LILLIAN D. LANE,  
Notary Public in and for  
Said County and State.

[Endorsed]: Filed December 15, 1950, Referee.

[Title of District Court and Cause.]

REPLY TO OBJECTIONS BY LINCOLN MINING COMPANY, INC., A CORPORATION, DEBTOR, TO APPROVAL OR CONFIRMATION OF THE ALTERED AND MODIFIED PLAN OF G. McGUIRE PIERCE

To: The Honorable Roger T. Foley, Judge of the District Court of the United States, in and for the District of Nevada:

Comes Now, G. McGuire Pierce, and replies to the Objections filed by Lincoln Mining Company, Inc., a corporation, the debtor in the above-entitled matter, and petitions this Honorable Court for confirmation of the plan in reorganization heretofore submitted by this proponent, and in connection therewith alleges and states as follows:

I.

Proponent admits that an original plan for reorganization and modification thereof was filed by G. W. Thiriot, President of Lincoln Mining Company, Inc., and in that connection denies that a firm offer to Debtor in reorganization was made by this proponent as alleged in Paragraph I of the aforesaid Objection, except for the final plan submitted to this Honorable Court on Tuesday, November 21, 1950.

II.

Admits the matters set forth in Paragraph II of said Debtor's Objections except that this proponent

denies on information and belief the matter set forth commencing with the word "therefore" on Line 4, Page 3, and ending with the word "creditors," Line 8, Page 3, and in connection therewith alleges that said stockholders fully considered and discussed the plan and certain modifications as presented by this proponent and agreed in open Court that said plan as modified was for the best interests of the corporation, its stockholders and its creditors, and that the required per cent of creditors and all of the stockholders have agreed to the plan proposed by this proponent, as modified; and that a stockholders meeting was held and a resolution adopted accepting the plan as modified and consenting to the execution of the lease referred to in said plan.

### III.

Proponent has no information on which to base a belief as to the matters set forth in Paragraph III of said Objections.

### IV.

That the creditors of said Debtor in reorganization have relied on the amended plan and have consented thereto as shown by the records of this Court and are expecting to receive immediate payment of their obligations in accordance with said plan heretofore proposed and approval of which was recommended by the Referee in Bankruptcy.

### V.

That the Atolia Mining Company, one of the creditors and the petitioner in reclamation in the

above-entitled proceeding, has relied on and accepted the plan heretofore approved and has executed the necessary instruments for conveyance of title in reliance thereon; that your proponent believes it is for the best interests of the corporation, for the stockholders and for the creditors of said corporation that no further delay be had in this matter, and that delay will be necessitated if a new plan is to be proposed in lieu of the plan submitted heretofore; that said Debtor corporation should not now be heard to object to the plan once approved by them, and approved by the Referee in Bankruptcy and approved by the above-entitled Court under Section 174 of the Act of Congress relating to bankruptcy; and further that the order entered by this Honorable Court on the 28th of November, 1950, provides that if confirmation of said plan is refused after said hearing, or any adjournment thereof, an order will be entered either adjudging said Debtor a bankrupt and directing that said bankruptcy be proceeded upon or dismissing the proceeding under Chapter 10 of said Act.

## VI.

That this proponent has expended great amounts of time and has incurred much expenses in reliance on the findings of the Referee after approval by the Debtor in reorganization and in reliance on the execution of the original lease and option duly executed by said corporation and submitted to the Court for approval.

Wherefore, G. McGuire Pierce, your proponent, prays that the Objections filed by the Lincoln Mining Company, Inc., be disallowed and that the amended plan as heretofore proposed by this proponent be confirmed; that this proponent pay the creditors of said corporation as provided for in said plan; that the Debtor corporation issue the shares of stock to this proponent as heretofore proposed; that these proceedings be dismissed and the property returned to the Debtor corporation; and the lease and option heretofore entered into by and between the said corporation and this proponent be confirmed and approved by this Honorable Court.

HAWKINS & CANNON,

By /s/ L. D. HAWKINS,

Attorneys for Proponent.

State of Nevada,  
County of Clark—ss.

G. McGuire Pierce, being by me first duly sworn, deposes and says:

That he is the proponent in the above-entitled action; that he has read the foregoing Reply to Objections and knows the contents thereof and that all the statements and averments of fact therein contained are true of his own knowledge, except those statements made upon his information and belief, and as to those he believes it to be true.

/s/ G. McGuire PIERCE.

Subscribed and sworn to before me this 15th day of December, 1950.

[Seal]      /s/ HOWARD W. CANNON,  
                 Notary Public in and for  
                 Said County and State.

My commission expires March 17, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed December 19, 1950, Referee.

[Endorsed]: Filed December 21, 1950, U.S.D.C.

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[Title of District Court and Cause.]

**ORDER TO SHOW CAUSE FOR ORDER CONFIRMING PLAN OF REORGANIZATION NOTWITHSTANDING OBJECTIONS OF DEBTOR**

At: Reno, in said district, this 29th day of December, 1950.

Upon the annexed findings and report of the Referee and Special Master in the above-entitled matter filed the 19th day of December, 1950, and sufficient reason appearing to me therefore, it is

Ordered that the Lincoln Mining Company, Inc., debtor, show cause before me in the United States District Court Room, Post Office Building, Las Vegas, Nevada, on the 2nd day of March, 1951, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the amended

and approved plan of reorganization submitted by the debtor corporation should not be confirmed notwithstanding the objections of the debtor corporation filed December 15, 1950, and the reply thereon of G. McGuire Pierce, proposed lessee, filed December 19th, 1950; and it is further

Ordered that service of a copy of this order and the findings and report of the Referee and Special Master be made upon Morse and Graves, Esqs., attorneys for the debtor, upon Hawkins and Cannon, Esqs., attorneys for the proposed lessee, G. McGuire Pierce, upon J. Howard Gray, Esq., attorney for petitioner in reclamation, Atolia Mining Company, et al., on or before the 5th day of January, 951, and that mailing a copy of this order, attached to the findings and report of the Referee to their address as of record in the office of the Clerk will be deemed good and sufficient notice hereof.

/s/ ROGER T. FOLEY,  
District Judge.

[Endorsed]: Filed December 29, 1950.

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[Title of District Court and Cause.]

MINUTES OF COURT  
January 9, 1951

At request of counsel for the respective parties, It Is Ordered that the setting of March 2, 1951, for hearing on Order to Show Cause for Order Con-

firming Plan of Reorganization Notwithstanding Objections of debtor be, and the same hereby is, vacated, and reset for February 12, 1951, at ten o'clock a.m., Las Vegas, Nevada.

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## [Title of District Court and Cause.]

MINUTES OF COURT  
February 5, 1951

Good cause appearing therefor, and no counsel being present. It Is Ordered that the hearing on Objections by Lincoln Mining Company, Inc., to Referee and Special Master's Report be, and the same hereby is, set for February 12, 1951, at ten o'clock a.m. at Las Vegas, Nevada, to follow Order to Show Cause.

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## [Title of District Court and Cause.]

MINUTES OF COURT  
February 12, 1951

This being the time heretofore fixed for hearing on Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor; Objections by debtor to Referee's and Special Master's Report; and Petition for Allowances and Expenses of Referee and Special Master, and the same coming on regularly at this time. Harold M. Morse, Esq., and William R. Morse, Esq., of the firm of Morse & Graves, ap-

pearing for and on behalf of the debtor. W. Howard Gray, Esq., appearing for and on behalf of Atolio Mining Company, Howard W. Cannon, Esq., of the firm of Hawkins & Cannon, appearing for and on behalf of G. McGuire Pierce. Frank W. Ingram, Esq., Referee and Special Master, is also present. Mr. Morse tenders for filing, "Exceptions and Objections of Lincoln Mining Company, Inc., Debtor, to the Referee and Special Master's Report on Objections to Confirmation of Plan by debtor Corporation, and Reply to Objections by G. McGuire Pierce, Proposed Lessee, and Findings thereon and Return to Order to Show Cause," which the Court does not permit to be filed as coming too late.

The Court states that the objections heretofore filed by debtor on January 3, 1951, will be considered. The Order to Show Cause and Objections of Debtor to Referee and Special Master's Report are taken up first, including debtor's Motion to Dismiss the Proceedings. Arguments are made by Messrs. Wm. R. Morse, Cannon and Gray. It Is Ordered that all matters noticed for today be, and they hereby are, continued to February 19, 1951, at ten o'clock a.m. at Las Vegas, Nevada.

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[Title of District Court and Cause.]

MINUTES OF COURT  
February 19, 1951

This being the time heretofore fixed for a further hearing herein on Order to Show Cause for Order Confirming Plan of Reorganization Notwithstand-

ing Objections of Debtor; Objections by Debtor to Referee and Special Master's Report and Motion to Dismiss; and Petition for Allowances and Expenses of Referee and Special Master, and the same coming on regularly at this time. Harold M. Morse, Esq., and William R. Morse, Esq., of the firm of Morse & Graves, appearing for and on behalf of the debtor. Howard W. Cannon, Esq., of the firm of Hawkins & Cannon, appearing for and on behalf of G. McGuire Pierce. On motion of Mr. Cannon, It Is Ordered that Carl Grainger be, and he hereby is, entered as associate counsel for Mr. Pierce. Mr. Grainger is also present. Mr. Morse files receipts for checks mailed and delivered to creditors and others including Atolia Mining Company, et al. Following arguments of counsel for the respective parties, It Is Ordered that all matters heretofore noticed for today be, and the same hereby are, continued to February 26, 1951, at ten o'clock a.m., at Las Vegas, Nevada.

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[Title of District Court and Cause.]

### MINUTES OF COURT

February 26, 1951

This being the time heretofore fixed for a further hearing on Order to Show Cause for Order Confirming plan of Reorganization Notwithstanding Objections of Debtor; and Objections by Debtor to Referee and Special Master's Report, and the same coming on regularly this day. Harold M. Morse and

William R. Morse, Esqs., appearing for and on behalf of the debtor. Howard W. Cannon, Esq., appearing for and on behalf of G. McGuire Pierce. Curtis A. Thornburgh is called to the witness stand, is duly sworn, and testifies. After a discussion of the proceedings and of proposed findings indicated by the Court, It Is Ordered that all matters heretofore noticed herein are continued to March 9, 1951, at ten o'clock a.m., at Las Vegas, Nevada.

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[Title of District Court and Cause.]

MINUTES OF COURT  
March 9, 1951

This being the date to which this matter was continued for further hearing and consideration of Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor, and the same coming on regularly this day. Harold M. Morse, Esq., and William R. Morse, Esq., appearing for and on behalf of the debtor, and Howard W. Cannon, Esq., appearing for and on behalf of G. McGuire Pierce. It Is Ordered, Adjudged and Decreed: 1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is, refused. 2. That the Lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc., and G. McGuire

Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.

3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.

4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court will, after hearing upon notice to the debtor, stockholders, and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings as in the opinion of the Judge may be for the interests of creditors. The Court reserves jurisdiction of these proceedings to make such other and further orders under the Bankruptcy Act as to the Court may seem just and proper. Dated: This 9th day of March, 1951, at Las Vegas, Nevada. Roger T. Foley, United States District Judge. Thereupon, in open Court, the Judge signs the following, viz: Findings of Fact and Order refusing Confirmation of Plan.

[Title of District Court and Cause.]

### DOCKET ENTRIES

1951

- Jan. 9—Entg. Order that the setting of March 2, 1951 for hearing on Order to Show Cause for Order Confirming Plan of reorganization notwithstanding objections of debtor is vacated and reset for February 12, 1951, at ten a.m., at Las Vegas.
- Feb. 5—Entg. Order Objections by Lincoln Mining Co., Inc., to Referee and Special Master's Report is set for hearing for Feb. 12, 1951, at ten o'clock a.m., at Las Vegas, Nev., to follow hearing on Order to Show Cause.
- Feb. 12—Hearing on Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor; Objections by Debtor to Referee and Special Masters Report; Petition for Allowances and Expenses of Referee and Special Master.
- Feb. 12—Entg. Order that all matters noticed for today are continued to Feb. 19, 1951, at ten a.m., Las Vegas, Nevada.
- Feb. 19—Further hearing on Order to Show Cause for Order Confirming plan of reorganization notwithstanding Objections of Debtor; Objections by Debtor to Referee and Special Master's Report and Motion

to Dismiss; and Petition for Allowances and Expenses of Referee and Special Master.

Feb. 19—Entg. Order that Carl Grainger is entered as associate counsel for Mr. Pierce.

Feb. 19—Entg. Order that all matters heretofore noticed for today are continued over to Feb. 26, 1951, at ten o'clock a.m., at Las Vegas, Nev.

Feb. 26—Further hearing on Order to Show Cause for Order Confirming plan of reorganization notwithstanding Objections of Debtor; and Objections by Debtor to Referee and Special Master's Report.

Feb. 26—Entg. Order that all matters heretofore noticed herein are continued to March 9, 1951, at ten o'clock a.m., at Las Vegas, Nev.

Mar. 13—Entg. Judgment at 9:30 a.m. Judgment: Ordered that the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is, refused. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc. and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as

to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties or determined by the Referee or the Judge of this Court, the Judge of this Court will, after hearing upon notice to the debtor, stockholders, and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings as in the opinion of the Judge may be for the interests of creditors. The Court reserves jurisdiction of these proceedings to make such other and further orders under the Bankruptcy Act as to the Court may seem just and proper.

In the District Court of the United States of America, in and for the District of Nevada

In Reorganization

No. A-60-A

In the Matter of

LINCOLN MINING COMPANY, INC.,

Debtor.

FINDINGS OF FACT AND ORDER  
REFUSING CONFIRMATION OF PLAN

"The order of the judge approving a plan, as provided in section 574 of this title, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan." 11 U.S.C.A. § 580.

"The plan of reorganization must be 'fair and equitable.' Such is the mandate of the statute (11 U.S.C.A. §621)." Petition of Portland Electric Power Co., 9 Cir., 162 F. 2d 618.

In reorganization proceedings the purpose is rehabilitation of the debtor and to preserve it as a going concern if possible; therefore, it is vital that favorable leases be held and unfavorable leases be rejected. Title Insurance & Guaranty Co. v. Hart, 9 Cir., 160 F. 2d 961.

Sec. 116 of Chapter X (11 U.S.C.A. § 516 (1)) gives the judge power to permit the rejection of executory contracts. The term "executory contracts" includes leases. 11 U.S.C.A. § 506 (7).

"In case an executory contract shall be rejected

pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter \* \* \* any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor." 11 U.S.C.A. § 602.

This case came on to be heard on the 12th day of February, 1951, pursuant to the Order of this Court of December 29, 1950, directing Lincoln Mining Company, Inc., Debtor, to show cause on the 2d day of March, 1951, at 10:00 o'clock in the forenoon of that day at the courtroom of the above-entitled Court in the United States Post Office and Courthouse at Las Vegas, Nevada, why the amended and approved plan of reorganization should not be confirmed notwithstanding the objections of the debtor corporation filed December 15, 1950. By consent of counsel the date of hearing of said Order to Show Cause was advanced to February 12, 1951, by order entered upon the minutes of this Court and the said hearing commencing on the 12th day of February, 1951, was continued from time to time until this date.

Having considered the said objections of the debtor corporation filed December 15, 1950, and the reply thereto of G. McGuire Pierce filed December 19, 1950, together with the Report of the Referee and Special Master on said objections and reply, the Court hereby makes findings of fact as follows:

## Findings of Fact

1. The Court accepts the Referee and Special Master's Finding No. 1 and No. 2.
2. That on or about the 6th day of November, 1950, by order of this Court the new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., was considered and treated as the modification of the plan heretofore approved September 26, 1950, and the Court ordered that such new plan be filed as such modification and fixed the 21st day of November, 1950, at 9:30 a.m. as the time and the courtroom of the United States District Court at Las Vegas, Nevada, as the place for the consideration of such new plan or modification and for the hearing of objections thereto.

That the proposed modification of the original plan filed herein by G. W. Thiriot November 6, 1950, included therein as Paragraph V the following:

“Mr. George McGuire Pierce, 6057 Maryland Drive, Los Angeles, California 36, makes the proposition to pay off the indebtedness of Lincoln Mining Company, Inc., in return for a bond and lease on the property, buildings, machinery, etc., for a period of ten (10) years. A total purchase price of \$150,000.00 payable from royalties at the rate of 10% on net returns to apply on purchase price. A contract to be worked out and executed if sanctioned by the court.”

3. That on the 21st day of November, 1950, and

at the place set for the consideration of said modified plan, the said G. McGuire Pierce, without prior notice to the corporation or its officers or stockholders or any of the creditors of the corporation, presented a written proposal to said corporation which is summarized as follows:

The said corporation be directed to issue 75,000 shares of its capital stock, held and unissued by said corporation as treasury stock, to the said G. McGuire Pierce; that a lease had been prepared on the mining property, the property of this corporation, by the attorneys representing the said G. McGuire Pierce, and was presented to the officers of this corporation for their signature on said date, the 21st day of November, 1950; and that the said G. McGuire Pierce would pay in cash to the Atolia Mining Company the sum of \$7700.00 to secure a full release from said company of all of their claims against the debtor corporation; that he would advance the sum of \$10,000.00 to pay all of the remaining creditors of the debtor corporation; that present at said court hearing before the Referee and Special Master were all the officers and directors of the debtor corporation, and as they were then and there informed by the said G. McGuire Pierce that the lease he had drawn and his proposal were final insofar as he was concerned, the said officers and directors of said corporation and its stockholders, therefore, accepted said modified plan. That said acceptance was made without full and careful consideration of the best interests

of the corporation, its stockholders, and its creditors.

4. That on the 29th day of November, 1950, with the consent of all the parties hereto and without objection of the debtor corporation, Lincoln Mining Company, Inc., the Judge of this Court made and entered an Order approving offer and plan of reorganization, said plan of reorganization being in substance the offer to debtor in reorganization filed in the office of the Clerk of the above-entitled Court November 29, 1950; that said plan so approved included a lease and option agreement entered into November 21, 1950, between the debtor corporation as lessor and G. McGuire Pierce as lessee. That by virtue of said lease the lessor leased all of the patented and unpatented mining claims therein described for a period of 20 years commencing on the 25th day of November, 1950, and continuing to the 24th day of November, 1970, with the privilege of renewal for a further period of 20 years. That for the use and occupation of the leased premises, the lessee was to pay lessor a rental or royalty from the net returns of ore or other products of said leased premises. That by the terms of said lease the lessee is given an option to purchase the leased premises for the total purchase price of \$150,000.00. That no work requirements are contained in said lease or plan of reorganization and by the terms of said lease and plan of reorganization the lessee could remain in control of and in possession of all of the properties of the said debtor corporation described in said lease for as long as 40 years without performing work or labor on said mining property.

other than that which from time to time might be required under the laws of the United States and the State of Nevada and on the unpatented mining claims described in the lease.

That if work and labor were not performed upon said property, and particularly upon the patented mining claims described in said lease, the property would deteriorate in value and become of little or no value to said debtor corporation or to the stock-holders of said corporation.

5. That said plan provides in addition to the lease above-mentioned that the debtor corporation shall transfer free and clear to the lessor, G. McGuire Pierce, 75,000 shares of the treasury stock of the said corporation; that the capital stock authorized to be issued by said corporation is 300,000 shares of stock, and said plan further provides that the said lessee shall have a first claim for all royalties due under the lease until lessee has been repaid all sums advanced to said debtor as provided for in said plan.

6. That the debtor corporation now finds itself financially able to pay all legal claims against it including the claim of the Atolia Mining Company for machinery and equipment and the administrative expenses incurred in these proceedings; and upon the hearing of this Order to Show Cause, the debtor corporation exhibited its ability and willingness to immediately pay claims of creditors and satisfy the claim of the Atolia Mining Company and the administrative expenses incurred in these pro-

ceedings, and exhibited its ability and willingness to make reasonable reimbursement to G. McGuire Pierce for monies actually expended after November 29, 1950, in furtherance of and pursuant to said plan.

7. That the plan of reorganization approved by the Judge of this Court November 29, 1950, under the conditions as they now exist is not fair or equitable.

8. That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant to said plan.

9. That with the Order to Show Cause herein there was served the Findings and Report of the Referee and Special Master to which was attached the objections by Lincoln Mining Company, Inc., Debtor, to confirmation of the modified plan of G. McGuire Pierce, said objections having been filed with the Referee and Special Master December 15, 1950.

10. As to Finding No. 3 of the Referee and Special Master, the Court will not adopt such finding for the reason that it appears to the Court that the plan approved will not insure commencement of the operation of the property and said plan would place it within the power of the lessee to refrain from operation of the property for as long as 40 years.

It Is Therefore Ordered, Adjudged and Decreed:

1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is, refused.

2. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc., and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.

3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.

4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court will, after hearing upon notice to the debtor, stockholders, and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt

and directing that bankruptcy be proceeded with or dismissing the proceedings as in the opinion of the Judge may be for the interests of creditors.

The Court reserves jurisdiction of these proceedings to make such other and further orders under the Bankruptcy Act as to the Court may seem just and proper.

Dated: This 9th day of March, 1951, at Las Vegas, Nevada.

/s/ ROGER T. FOLEY,  
United States District Judge.

[Endorsed]: Filed March 9, 1951.

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In the United States District Court,  
District of Nevada  
No. A-60-A

In the Matter of  
LINCOLN MINING COMPANY, INC., a Corpora-  
tion,

Debtor.

G. McGUIRE PIERCE,

Appellant,

vs.

LINCOLN MINING COMPANY, INC., a Corpora-  
tion, Debtor,

Appellee.

**NOTICE OF APPEAL**

To: The Honorable Roger T. Foley, United States  
District Judge, to Lincoln Mining Company,

Inc., a corporation, Debtor, and to John S. Halley, Esquire, Reno, Nevada, and Morse and Graves, Las Vegas, Nevada, its attorneys of record, and to Amos P. Dickey, Clerk of the above-entitled Court:

You and each of you will please take notice and notice is hereby given that G. McGuire Pierce hereby appeals to the United States Court of Appeals for the Ninth Circuit from that order, final judgment and decree and each and every part thereof and the whole thereof entered in the bankruptcy docket of the above-entitled court on the 13th day of March, 1951, at pages 198 and 199 of said bankruptcy docket, which said order, final judgment and decree was signed by the Honorable Roger T. Foley, Judge of the above-entitled court on the 9th day of March, 1951, and was entered in the Court Minutes of that day in the General Minute Journal #1, Las Vegas Minutes at page 271 and designated "Findings of Fact and Order Refusing Confirmation of Plan."

Dated at Carson City, Nevada, this 7th day of April, 1951.

HAWKINS, AND CANNON,

KYLE Z. GRAINGER,

By /s/ KYLE Z. GRAINGER,  
Attorneys for Appellant.

[Endorsed]: Filed April 7, 1951.

[Title of District Court and Cause.]

STIPULATION OF PORTIONS OF THE RECORD PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

It Is Hereby Stipulated and Agreed by and between G. McGuire Pierce, appellant in the above-entitled matter, and Lincoln Mining Company, Inc., a corporation, debtor, appellee in said proceeding, by and through their respective attorneys, that the portions of the record proceedings and evidence to be contained in the record on appeal to the United States Court of Appeals for the 9th Circuit from the Order, Judgment and Decree appealed from in the above-entitled proceeding, shall be as follows:

1. Petition for Corporate Reorganization under Chapter X, filed March 22, 1950.
2. Order Approving Petition and Continuing Debtor in Possession, filed March 22, 1950.
3. Order of Reference to Frank W. Ingram, Referee and Special Master, filed March 22, 1950.
4. Proposal of Plan for Reorganization of Lincoln Mining Co., Inc., Debtor, filed June 30, 1950.
5. Copy of Supplement to Proposal of Plan of Reorganization, filed July 14, 1950.
6. Order for Hearing on Objections or Amendments to Plan Proposed by Debtor in Possession under Section 170 of the Bankruptcy Act, filed July 27, 1950.

7. Report of Referee and Special Master on Hearings on Objections or Amendments to Plan under Section 170 and for Continuance of Debtor in Possession under Section 162 of Bankruptcy Act, filed September 22, 1950.

8. Order Approving Plan of Reorganization, filed September 26, 1950.

9. Proposal of Plan for Reorganization of Lincoln Mining Company, Inc., Debtor (dated October 31, 1950, filed November 6, 1950), submitted by G. W. Thiriot, President of Lincoln Mining Company, Inc., attached to which is Plan of Reorganization Lincoln Mining Company, Inc. Both Proposal of Plan and Plan attached to be included in record on appeal.

10. Order (dated 6th day of November, 1950, signed by Roger T. Foley, United States District Judge), filed November 6, 1950, ordering that new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., be considered and treated as a modification of the plan heretofore approved September 26, 1950. Order fixed 21st day of November, 1950, as the time in the Court Room of the United States District Court at Las Vegas as place for the consideration of the new Plan of Reorganization and for hearing of objections thereto.

11. Order captioned "Order Extending Times for filing of Claims and Acceptances and for Hearing Objections to Alteration and Modification of Plan and for Confirmation of Such Altered Plan and for Notice of Hearing Thereon," signed by

Frank W. Ingram, Referee and Special Master, and filed on November 6, 1950.

12. (a) Offer to Debtor in Reorganization. (Filed November 29, 1950, in the office of the Clerk at Carson City, and on November 21, 1950, with Referee Ingram. Offer signed by G. McGuire Pierce, dated 21st day of November, 1950).

(b) An Amended Offer to Debtor in Reorganization. (Filed Nov. 29, 1950, Clerk's Office, Carson City, and on November 27, 1950, with Referee in Bankruptcy, dated 22nd day of November, 1950, signed by G. McGuire Pierce by Howard W. Cannon, Attorney at law.)

13. Lease and Option Agreement (filed November 29, 1950, with Clerk at Carson City, dated 21st day of November, 1950, executed by Lincoln Mining Co., Inc., a Nevada Corporation, as Lessor, by G. W. Thiriot, President, by Eva Koyen, Secretary, G. McGuire Pierce as Lessee. All duly notarized.)

14. Findings and Report of Referee. (Filed November 29, 1950, Clerk, Carson City. Dated 28th day November, 1950, Frank W. Ingram, Referee and Special Master).

15. Order Approving Offer and Plan of Reorganization (Filed Nov. 29, 1950, Amos P. Dickey, Clerk, dated 28th day of November, 1950, Roger T. Foley, Judge.)

16. Order Fixing Hearings on Confirmation of Plan and Dismissal of Proceedings or Adjudication and Providing for Notice Thereof. (Filed Novem-

ber 29, 1950, with Clerk at Carson City, dated November 28, 1950, Frank W. Ingram, Referee and Special Master, Roger T. Foley, District Judge.)

17. Referee and Special Master's Report on Objections to Confirmation of Plan by Debtor Corporation and Reply to Objections by G. McGuire Pierce, Lessee, and Findings Thereon. (Filed December 21, 1950, Clerk at Carson City, not dated, signed Frank W. Ingram, Referee in Bankruptcy. Attached to this instrument is Objections by Lincoln Mining Company, Inc., a corporation, Debtor, to Approval or Confirmation of the Altered and Modified Plan of G. McGuire Pierce, showing original to have been filed Dec. 15, 1950, with Frank Ingram, Referee. Attached also to said instrument is Reply to Objections by Lincoln Mining Company, Inc., a corporation, Debtor, to approval or Confirmation of the Altered and Modified Plan of G. McGuire Pierce, showing original to have been filed December 19, 1950, Frank W. Ingram, Referee. Both Referee and Special Master's Report and attached instruments to be included in Record on Appeal.)

18. Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor. (Filed December 29, 1950, Amos P. Dickey, Clerk at Carson City, Nevada, dated 29th day of December, 1950, signed by Roger T. Foley, District Judge.)

19. Minute Order January 9, 1951, entered in General Minute Journal #5, Carson City Minute Journal, at Page 501, and entry thereof on January

9, 1951, in Bankruptcy Docket of said Court at page 198, "Eng Order that setting of March 2, 1951, for hearing on order to show cause for order confirming plan of reorganization notwithstanding objection of debtor is vacated and reset for February 12, 1951, at 10:00 a.m., at Las Vegas."

20. Order entered February 5, 1951, in Bankruptcy Docket as follows: "Enty. Order Objections by Lincoln Mining Co., Inc., to Referee and Special Master's Report is set for hearing for Feb. 12, 1951, at 10 o'clock a.m., at Las Vegas, Nev., to follow hearing on order to show cause."

21. Minute Order of February 12, 1951, entered in General Minute Journal #1, Las Vegas Minute Journal at page 245 and entry thereof on Feb. 12, 1950, in Bankruptcy Docket at page 198 "Hearing on Order to show cause for order confirming plan of Reorganization notwithstanding objections of debtor to Referee and Special Master's Report; petition for allowance of expenses of Referee and Special Master Entg. Order that all matters noted for today are continued to Feb. 19, 1951, at 10:00 a.m., at Las Vegas, Nevada."

22. Minute Order of Feb. 19, 1951, entered in General Minute Journal #1, Las Vegas Minutes at pages 250-251 entitled "In the Matter of Lincoln Mining & Milling Company, Debtor," and entry thereof in Bankruptcy Docket page 198 "Further hearing on order to show cause for order confirming plan of reorganization notwithstanding objections of debtor; objections of debtor to Referee and Spe-

cial Master's Report and motion to dismiss; petition for allowances and expenses of Referee and Special Master. Entg. order that Carl Grainger is entered as associate counsel for Mr. Pierce. Entg. order that all matters heretofore noticed for today are continued over to February 26, 1951, at 10:00 a.m., at Las Vegas, Nevada."

23. Minute Order of February 26, 1951, at Page 255 General Minute Journal #1, Las Vegas Minutes and entry thereof in Bankruptcy Docket Feb. 26, 1951. "Further hearing on order to show cause for order confirming plan of reorganization notwithstanding objections of debtor; and objections by debtor to Referee and Special Master's Report. Entg. order that all matters heretofore noticed herein are continued to March 9, 1951, at 10:00 a.m., at Las Vegas, Nevada."

24. Minute Order of March 9, 1951, entered in General Minute Journal #1 Las Vegas at Page 271, and entry thereof of March 13, 1951, in Bankruptcy Docket at Pages 198 and 199.

25. Findings of Fact and Order Refusing Confirmation of Plan (filed March 9, 1951, at Carson City, Amos P. Dickey, Clerk, dated 9th day of March, 1951, Roger T. Foley, United States District Judge).

26. Notice of Appeal (filed April 7, 1951).

27. Stipulation of Certain Facts for use on Appeal.

28. Reporter's transcript designated "Hearing

on Objections to Altered Plan" of hearings held November 21, 1950, and continued hearing held November 22, 1950.

29. Reporter's transcript of "Portion of Hearing of December 15, 1950, Relating to Confirmation of Plan of Reorganization."

30. Statement of Points upon which Appellant will rely upon Appeal filed April 7, 1951.

Dated: This 26th day of April, 1951.

HAWKINS & CANNON,

By /s/ H. W. CANNON.

GRAINGER, CARVER &  
GRAINGER,

By /s/ KYLE Z. GRAINGER,  
Attorneys for Appellant.

JOHN S. HALLEY, and  
MORSE & GRAVES,

By /s/ WILLIAM R. MORSE,  
Attorneys for Appellee.

[Endorsed] Filed April 30, 1951.

[Title of District Court and Cause.]

### COST BOND ON APPEAL

Know All Men by These Presents:

Whereas, G. McGuire Pierce has filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from that order, final judgment and decree and each and every part thereof and the whole thereof, entered in the bankruptcy docket of the above-entitled court on the 13th day of March, 1951, at pages 198 and 199 of said bankruptcy docket, which said order, final judgment and decree was signed by the Honorable Roger T. Foley, Judge of the above-entitled court, on the 9th day of March, 1951, and was entered in the Court Minutes of that day in the General Minute Journal #1, Las Vegas Minutes at page 271 and designated "Findings of Fact and Order Refusing Confirmation of Plan";

Further, Know all Men by These Presents that we, as sureties, our successors, jointly and severally, are held and firmly bound unto Lincoln Mining Company, Inc., a corporation, debtor, in the full and just sum of \$250.00 to be paid to the said Lincoln Mining Company, Inc., a corporation, debtor, its successors and assigns to which payment, well and truly to be made, we bind ourselves by these presents.

Now, the condition of this obligation is such that if the said G. McGuire Pierce shall prosecute his appeal to effect and shall pay costs if the appeal is dis-

missed or the judgment affirmed or such costs as the said United States Court of Appeals, for the Ninth Circuit may award against the said G. McGuire Pierce if the judgment is modified, or in any other event, then this obligation to be void, otherwise to remain in full force and effect.

Dated, this 7th day of April, 1951.

[Seal]                    HARTFORD ACCIDENT AND  
                              INDEMNITY COMPANY,

By /s/ J. S. SLINGERLAND,  
Attorney in Fact.

State of Nevada,  
County of Washoe—ss.

On this 6th day of April, A.D. 1951, personally appeared before me, a Notary Public in and for Washoe County, State of Nevada, J. E. Slingerland Attorney in Fact, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Hartford Accident and Indemnity Company and acknowledged that he subscribed the name of said Hartford Accident and Indemnity Company thereto as Principal, and his own name as attorney-in-fact freely and voluntarily for the uses and purposes therein mentioned; that said J. E. Slingerland is known to me to be the attorney-in-fact duly authorized to execute the same on behalf of said Hartford Accident and Indemnity Company, a corporation, and said J. E. Slingerland upon oath did depose that he is the attorney-in-fact for said corporation as above designated; that he

is acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the county aforesaid, the day and year in this certificate first above written.

[Seal] /s/ WYMAN EVANS,  
Notary Public in and for the County of Washoe,  
State of Nevada.

My commission will expire April 22, 1954.

[Endorsed]: Filed April 7, 1951.

[Title of District Court and Cause.]

## STIPULATION OF CERTAIN FACTS FOR USE ON APPEAL

It Is Hereby Stipulated and Agreed by and between Lincoln Mining Company, Inc., a corporation, debtor, appellee, and G. McGuire Pierce, appellant above named, by their respective attorneys, as follows:

1. That this stipulation shall not nor shall anything contained in it prejudice any right that the appellee may have to urge and contend that G. McGuire Pierce, appellant herein, is without right of appeal in this proceeding and shall not bar appellee from obtaining a determination as to whether said G. McGuire Pierce has a right of appeal in respect to the order appealed from. The "Stipulation of Portions of the Record Proceedings and Evidence To Be Contained in the Record on Appeal" shall likewise be without prejudice to such right of appellee to so contend and have determined such right of appeal.
2. That all proceedings commencing with the filing of Debtor's petition for corporate reorganization to and including the making of the "Order Approving Plan of Reorganization," filed September 26, 1950, were due and regular.
3. That upon the hearings before the Honorable Judge on "Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor," extensive arguments of coun-

sel were heard before the Honorable Judge; that although the transcripts of the hearings before the Referee and Special Master on November 21, 1950; November 22, 1950, and December 15, 1950, were not formally introduced in evidence, the transcripts were considered and referred to by the Honorable Judge during the hearings held before him, resulting in the Order appealed from in this proceeding.

Evidence was duly presented to the Court and proper vouchers filed with the Clerk of the Court, evidencing the payment of all of the claims filed against the corporation and allowed by the Referee, including the claim of Atolia Mining Company. The total of said indebtedness so paid and the receipts so filed is the sum of \$20,037.59, and that in addition thereto there was paid to the Clerk of the Court for the costs of administration in this case, pursuant to the statement of the Referee and Special Master, the sum of \$1,879.27, making a total of all payments in the sum of \$22,186.86.

That additional testimony given and received in said hearings before the Honorable Judge was the testimony of Curtis A. Thornburgh, Auditor for the Debtor corporation, whose testimony in effect was that the debtor corporation had paid all its operating expenses incurred by it as debtor in possession, with the exception of one claim, and that concentrates were on hand from which more than sufficient funds would be obtained with which to pay such claim.

That prior to the making of said Order appealed

from, said Debtor paid no sum of money to G. McGuire Pierce, appellant herein, who claims and has claimed interest and rights as contended in the appeal. The Debtor corporation, at the time of the making of the order appealed from in this proceeding, was and still is, financially able to pay the sums required by said order to be paid to the said G. McGuire Pierce.

4. The record on appeal, including the matters set forth in this Stipulation, constituted the evidence considered by the Honorable Judge in making the order and decree appealed from in this proceeding.

HAWKINS & CANNON,

By /s/ H. W. CANNON.

GRAINGER, CARVER &  
GRAINGER,

By /s/ KYLE Z. GRAINGER,  
Attorneys for Appellant.

JOHN S. HALLEY, and  
MORSE & GRAVES,

By /s/ WILLIAM R. MORSE,  
Attorneys for Appellee.

[Endorsed]: Filed April 30, 1951.

[Title of District Court and Cause.]

HEARING ON OBJECTIONS TO  
ALTERED PLAN

November 21, 1950

Before: Honorable Frank W. Ingram,  
Referee in Bankruptcy.

Appearances:

HAROLD M. MORSE, ESQ., on behalf of:  
JOHN S. HALLEY, ESQ., and  
MESSRS. MORSE and GRAVES,  
Attorneys for Debtor.

W. HOWARD GRAY, ESQ., on behalf of:  
MESSRS. GRAY & HORTON,  
Attorneys for Atolia Mining Co., et al.

HOWARD W. CANNON, ESQ.,  
Representing G. McGuire Pierce, Lessee.

Referee: Since our last meeting, the Referee made a report to the Court. At the last hearing, the motion of the debtor to dismiss the petition of Atolia Mining Company for reclamation, was denied, and the debtor was given twenty days in which to answer or otherwise plead to the petition. There was no objection to the debtor's remaining in possession under Section 161, Title 11, on Reorganization, and as a result of that hearing, the Referee made his report to the Court under Sections 161 and 170,

and after modification of the plan disclosed at that meeting, the Court made its Order approving that plan, on recommendation of the Referee, with instructions that copies of the reorganization plan be sent out to the creditors with certain findings, opinions and summary and forms of acceptance, under Section 175, the Court having approved that plan. An affidavit of mailing by the debtor is in the record, and thereafter one G. W. Theriot, President of the Lincoln Mining Company, holding fifty per cent of the stock, filed a proposal for alteration and modification of the approved reorganization plan, and on the 6th day of November, 1950, the Referee filed an Order extending the time theretofore granted for the filing of those notices of acceptance from the 10th day of November to the 18th day of November, and set up this time and place as the time to hear any objections to the altered plan which had been approved by the Court.

It was further ordered that any stockholders and creditors who previously accepted the plan of reorganization and modification would be deemed to accept this altered plan unless they specifically rejected the altered or modified plan.

That thereafter, on the 6th day of November, 1950, a notice of hearing and consideration of the alteration and modification of the plan of George W. Theriot, President, was sent to all creditors and stockholders by the Referee, and in that was summarized the proposed changes and alterations on the proposition submitted by George McGuire Pierce, and contained in Mr. Theriot's plan of reorganization. Notice was given of the hearing under

Sections 170 and 175, and also on the hearing of the Atolia petition.

As of the 18th of November, 1950, the final date for the filing of claims, the Court received some twenty-seven claims of creditors, including Claim No. 15, Theriot Brothers, for \$4,559.60; No. 16, G. W. Theriot, for \$1,769.10, and Claim No. 17, Dean P. Theriot, in the amount of \$1,664.16. [2]

Thereafter objections were made to those particular claims, and for the purpose of this meeting, they are not approved.

The claim of Wesley Koyen, No. 25, in the amount of \$7,085.77, was not verified or itemized as required by the statute, and failed to give the years in which the work was claimed, and was not itemized, and that claim was not approved for the purpose of this meeting.

The balance of the claims, some \$10,100.00—something of that nature, have been filed. Of that amount, more than seventy-five per cent of those creditors have accepted the plan, that is, the altered and revised plan. The statute requires a hearing on confirmation of the plan, Section 179 (reads)—after a plan has been accepted in writing, and filed in Court, on behalf of creditors holding two-thirds of the claims filed and allowed \* \* \* and if the debtor is not found \* \* \* stockholders holding a majority of the stock, then after this hearing, if there are no objections to the plan, the Court may make its Order confirming it, and give the debtor a certain time in which to consummate the plan.

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

Are there any objections to the ultimate plan, and if so, let us have it right now. I don't know whether all the stockholders know what the alterations are now, and if not, I'll ask Mr. Morse to read them and summarize it.

Mr. Morse: I think there's a good summarization of that, your Honor, in your Notice.

Referee: Are there any questions the creditors would like to ask?

Mr. Cannon: This is not for the purpose of asking a question, Judge, but I might state that the plan as disclosed by Mr. Theriot—we consider our offer to the debtor in reorganization that was filed with the Court this morning as supplementing that plan in detail, inasmuch as the proposed plan was not specifically in detail in some particulars, and that is the condition [3] on which the offer in reorganization is made, the offer presented to the Court this morning.

Referee: Will you explain that to the creditors?

Mr. Cannon: I think probably reading the offer would best explain it, and then I can elaborate on it if necessary (reads). The offer to the debtor in reorganization was accompanied by a proposed lease, and my suggestion would be that copies be made available to any of the creditors or stockholders who may desire it, and if we do recess until the afternoon, they would have an opportunity to examine it.

Referee: I think if the stockholders accept the proposal, your statement, as far as the creditors are concerned, they will be taken care of, and my list,

up to and including \$10,000.00 of claims which are subsequently approved by the Court—the understanding being that those creditors will be paid. I don't know if the creditors will be too much interested in having the details of the agreement between the proprietor and Mr. Pierce.

Mr. Cannon: I might state that the offer of \$10,000.00 would be sufficient to pay the claims that were listed as obligations of the corporation in Paragraph 4 of the Proposal that was filed with the Court on November 6th. In that list of obligations, there were no amounts set forth after the names of the Theriot Brothers, Wesley Koyen or G. W. Theriot, which were some of the claims which the Court had not approved or accepted at this time for the purpose of this hearing; also a general statement of the sum of \$5,000.00 for labor claims, and I am led to believe that the labor claims that have been filed will not exceed that amount.

Referee: It is my understanding that when I put the Order on them to segregate that item in their original submission, that they wrote it down, and I think we have a record of those, and they estimated \$5,000.00, and when you audited it, it came to [4] \$3,100.00.

Mr. Morse: I think that's substantially correct.

Referee: I recollect there was not sufficient time to notify the creditors of these proceedings, so we got a supplemental schedule to their original plan of reorganization, and as I recall, it's something like \$3,100.00.

Mr. Cannon: It would appear that the \$10,000.00 would be sufficient, excluding the matter between

the Atolia Mining Company and Lincoln Mining Company, and excluding the matter between Clark County Wholesale—which the proponent, Mr. Pierce, proposes to either pay or assume the contract for with the Clark County Wholesale, as they may desire. The proposition also provided that a bond would be furnished to secure the Atolia Mining Company in any sums that they may determine to be due them. I don't believe that I need make any further explanation. If any one has any questions to ask concerning any particular portion, I would be happy to go over it—

Mr. Gray: May it please the Court and Counsel, I am not appearing as a creditor or one interested in this plan except as to Paragraph "C," which proposes to pay up a surety bond to satisfy any indebtedness which may be due Atolia. Atolia does not recognize the Lincoln Mining Company as one of its debtors at all. Our business is entirely with Mr. Koyen and Mr. Theriot, and the proposition of a surety bond does not meet with the approval of Atolia. The plan is satisfactory otherwise, and there is no doubt but that Mr. Pierce and Mr. Atolia can get together. I can say, however, that I think the idea of a surety bond does not appeal to Atolia.

Mr. Morse: I would suggest, your Honor, that the matter be continued. I talked with Mr. Gray yesterday, and we definitely agreed that his petition to reclaim the property would come up for approval, and if it was approved, then we would have an opportunity [5] to serve as Mr. Pierce's counsel and also the stockholders, and see what we can work out.

Mr. Gray: That understanding is correct, your

Honor, but before we get away, your Honor, we desire that the objection be submitted.

(Recess from 12:00 noon until 2:00 p.m.)

2:00 o'Clock P.M.

Mr. Morse asks the indulgence of the Court to talk over the lease with the interested parties.

Granted.

\* \* \*

Mr. Morse: It is the opinion of the Board of Directors of the Corporation that the plan be accepted and the lease signed.

Referee: Under Section 179—two-thirds of the creditors accepted the modified plan of reorganization, and one hundred per cent of the stockholders have accepted and approved the altered plan. Mr. Morse announces that the offer to the debtor in reorganization, with a copy of the proposed agreement, has been accepted by the stockholders. Have you signed the lease and option agreement?

Mr. Morse: No, but we will do so, your Honor.

Referee: I will need an additional copy of the Offer of Reorganization with the signed copy of the agreement attached. I would prefer to have the original agreement to attach to the offer, and one copy of the report. We will make my copy conform to the one you signed, and if you give me two copies of the agreement, I shall be happy to file it.

Mr. Cannon: May I point out to the Court that Paragraph "C" of the proposed offer apparently will have to be adjusted because of Mr. Gray's decision, and we would like the Court to sit in as Referee on that because that is something between the stockholders and Mr. Gray's corporation. Mr.

Gray has advised [6] that he does not feel that the surety bond should be accepted.

Referee: Mr. Gray is not the principal—and see what can be done under that Section.

Mr. Cannon: May we also ask the Court, please, as part of the Order, that in the acceptance, the officers and directors of the Corporation be directed to execute a promissory note and a realty mortgage, securing the same within a reasonable time after the amount of the note can be determined, in accordance with the proposal now before the Court.

Referee: So Ordered. You understand this matter has to go up with my report to the Judge, and he signs the Order.

Mr. Morse: All the Corporation need sign is the lease itself. Will four copies be sufficient?

Referee: I'll need two at least, and one for Mr. Pierce.

Mr. Cannon: And also, Judge, as part of that Order, we recommend to the Court that the officers and directors of the Corporation be authorized and instructed to issue a certificate for the remaining 75,000 shares of Treasury Stock to Mr. G. McGuire Pierce, on the consummation of this transaction, showing him to be the principal and lawful owner.

Referee: That will be the Order of the Court, and confirmation of the proposal, and I might state to you gentlemen that an Order be prepared for submission to the Court, and that it contain all you want in it, and I will send it to the Court for approval.

Mr. Cannon: In the payment of the bills, Judge,

the Court will authorize and approve those, together with a member of the Corporation—or what do you prefer?

Referee: In view of the fact that the creditors are to be paid moneys due them, you can handle it on the signature of the Referee, with a certain officer—or Mr. Pierce can sign and be an officer of the Corporation, but I don't want to obtain [7] bills which do not pay off the creditors. Now, you can do whatever you please in the proposed Order. You want the Court to supervise the creditors and see that others aren't paid, and moneys deposited. Let us not make a requirement for the Court to pay the contracts for the next two or three years.

Mr. Cannon: If the Court please, may we suggest that the moneys be paid into the Court, and that the claims to be paid, payment authorized directly by the Court of the claims approved by the present Corporation.

Referee: In other words, you want me to handle that money in trust and pay it?

Mr. Cannon: I think that would probably be best, Judge.

(Discussion off the record.)

Referee: It will be the Order of the Court that the money deposited by Mr. Pierce be placed in the First National Bank of Nevada, which is the depository of the bankruptcy funds, and withdrawn on the co-signatures of the Lincoln Mining Company and Mr. Pierce, as Lessee, and shall only be paid from that trust fund on claims which are approved by the Referee.

Mr. Cannon: Does your Honor have any idea how soon this lease would be approved by the Court, so that we can decide on an effective date?

Referee: No. I can tell you if you get out the Order, with three copies of the offer, I shall make my recommendation to the Court that the plan be confirmed and the agreement be approved. Under my Order, you are given ten days in which to object to the Order. You can waive that by advising the Court when you send that Order to me, that you have seen the proposed Order and do not object, and that applies to the Corporation; Mr. Gray represents them—as well as to Mr. Pierce. It appears to me that it is not going to take very long to consummate your plan either. As soon as you do the things the Court orders for you to do, [8] the Court will give you confirmation of your plan, and you will immediately go ahead and dismiss the reorganization proceedings. Mr. Gray, the Corporation has accepted the plan, and the matter before the Court is Paragraph "C" of the Order, which is the surety bond.

Mr. Gray: Your Honor, we do not believe the surety bond is what we want. I am in a position to make this offer to Mr. Pierce, and that is, Atolia will convey to Mr. Pierce its title to the property covered by the Conditional Sales Contract. There is now due on that contract, as we calculated, \$6,000.00 principal, plus \$1,013.95 interest, and we will make this kind of a proposition—\$2,000.00 down, and the balance payable in monthly payments, with interest as provided in the present contract.

Referee: What is the set rate?

Mr. Gray: Six per cent on the deferred payments, and then after the total payment is due, there's ten per cent penalty.

Referee: I don't believe the 10% is allowable, in view of the fact that the Corporation is in reorganization. How long are you basing that 6% on?

Mr. Gray: It has run since the contract was written, your Honor.

Referee: When did you raise this 10%?

Mr. Gray: We didn't raise it. The contract provides for that. The contract was written on the 3rd day of December, 1948. The first payment of \$2,000.00 was due on or about the 31st day of December, 1948, and the balance was in monthly payments of \$333.33, with 6% after the total becomes due. It took about a year to run, and then it provided for the penalty of 10% on the balance due.

Referee: When does that 10% start?

Mr. Gray: The contract provides that the unpaid balance—and each of the installments thereafter, at the rate of 6% from [9] the date thereof, but in the event that it shall not be paid, each of said installments shall bear the rate of 10% from the date of maturity thereof until paid. That was the contract, your Honor.

Mr. Cannon: How about the additional claims?

Mr. Gray: The additional items, if satisfactory, I'll make this proposition—There's credit to Theriots of \$2,034.75 as royalty due them but which we have credited against the amounts due Atolia. There's a total of \$8,704.91. There's a total amount

on this series of items of \$8,931.13, giving credit to Theriot and Koyens for \$2,034.75 on royalty. Now, if you want to wind the whole thing up—all the items—we'll throw off the interest, which leaves a balance of \$7,887.75. That covers everything except the pending suit in the Seventh District Court, County of Lincoln, Pioche.

Referee: And that's against you by Theriot and Koyens.

(A short recess is taken to talk the matter over.)

\* \* \*

Mr. Cannon: Judge, in view of the fact that Atolia will not accept Paragraph "C" of our proposed offer, we have worked out an additional proposal to be inserted in lieu of Paragraph "C" at this time, and if Atolia accepts, fine, and if not, we will take other steps. The proposal in lieu of the bond, as proposed in Paragraph "C"—the Atolia were not willing to accede to Paragraph "C" of the proposal. In the plan filed with the Court on November 6th, the claim of Atolia Mining Company is shown to be in the sum of \$6,000.00 on a conditional sales contract, plus an additional sum of \$1,700.00 on open account, which we understand is not a correct amount, nor is it a fully determined amount at this time—and perhaps a personal obligation of two of the stockholders. We are, therefore, at this time offering in lieu of Paragraph "C" of our proposal, that we will accept on behalf of the Corporation the [10] amount due the Atolia Mining Company as shown in the proposal filed

November 6th, on the conditional sales contract, in the sum of \$6,000.00, and will advance \$2,000.00 cash, upon the approval of the Court of this proposal, toward payment of the \$6,000.00, and the balance will be in twelve equal monthly installments, together with interest at 6% on the unpaid amount, to satisfy the claim of the Atolia Mining Company under their conditional Sales contract to the machinery and equipment, to which they own the title on the mining property.

Referee: Set that in writing in lieu of Paragraph "C."

Mr. Gray: What is the status of the \$1,700.00?

Mr. Cannon: The \$1,700.00 I presume to be subject to the litigation which is now in process between two of the stockholders of the Lincoln Company and the Atolia Company. That \$1,700.00 is in the present litigation, is it not?

Mr. Gray: No.

Mr. Morse: All of this indebtedness was incurred after the suit was filed and after the demurrer was argued and submitted to the Court for decision.

Referee: What does the \$1,700.00 consist of?

Mr. Morse: That, your Honor, is additional machinery purchased by Atolia, not on the conditional sales contract account but on open account.

Referee: As I recall the testimony of Mr. Koyen in the first meeting, the argument was made that Atolia applied certain royalties to the payment of some of these accounts; which one it was, I don't know.

Mr. Morse: We get credit for that on this statement.

Referee: How does that apply against the \$6,000.00 and the \$1,700.00?

Mr. Morse: The total of all of the indebtedness due Atolia is \$10,976.88, and then deduct \$2,034.75, leaves a net balance [11] of \$8,942.13, and then a discount of \$1,043.38, which is the interest to be adjusted on that basis. We accepted it but Mr. Pierce—

Referee: He offers to pay \$6,000.00—\$2,000.00 down and the balance in twelve payments.

Mr. Morse: Only on the conditional sales contract.

Referee: That's the first item of \$6,000.00; is that satisfactory.

Mr. Cannon: That was our offer.

Mr. Morse: Here is what the net result is, your Honor. Atolia has to be paid what is due them, and if that comes into the \$10,000.00 that you didn't put up, someone owes the creditors, and how are they going to get their money?

Referee: That \$6,000.00 is not unsecured claims. That's secured claims against machinery.

Mr. Morse: That's correct, but the rest of it is all unsecured.

Mr. Gray: That \$6,000.00 I'll straighten out so there will be no more argument about it because as far as the offer is made now by Mr. Pierce on machinery covered in the conditional sales contract, I understand he has offered to pay \$6,000.00—\$2,000.00 down, and the balance in twelve months,

which is \$333.33 a month, I think, plus interest at the rate of 6%.

Referee: That's wiping out all of your conditional sales contract and everything else.

Mr. Gray: Wiping out all the interest on the contract. I am not in a position to accept that. My instructions were to do business on the conditional sales contract, on a time basis. Then it would be \$6,000.00 plus earned interest, with \$2,000.00 down and the balance in twelve payments.

Referee: You want that modified, and you recommend its approval on the basis of \$6,000.00 plus \$2,000.00 down, and the [12] balance in twelve monthly payments of \$333.33.

Mr. Gray: If it's added to the \$6,000.00 and interest. I will have to go back to my client to get a different authorization.

Mr. Cannon: With respect to the other \$1,700.00, our position is that we want the interest on the \$6,000.00 wiped out. That is the principal amount due. That's all the principal they claim due. We are willing to pay that principal by the payment of \$2,000.00 cash and the balance, with 6% interest on the unpaid balance in twelve installments.

Referee: Is that acceptable?

Mr. Gray: I don't know. I can't accept, and I won't reject it. It's not in accordance with my instructions at the present time. I'll send it back to my principal, of course.

Referee: Did you want it put in your offer?

Mr. Cannon: That's correct.

Referee: \$1,700.00—what's that?

Mr. Cannon: We were advised by Mr. Gray earlier in the day that that is not the correct figure. Apparently, it is not the obligation of the Lincoln Mining Company. It's a personal obligation as evidenced by the fact that one sum in it is personal taxes of \$1,100.26. There is also a claim here for the Lincoln general taxes for the year 1949, for \$555.00, so it is obvious that any tax claim for any year prior to 1949 could not be a valid obligation of the Corporation.

Referee: We'll find out who it belongs to.

Mr. Gray: As a matter of fact, the conditional sales contract does not belong to the Corporation either.

Referee: If you get the \$6,000.00 for your machinery, you will be happy, plus—What's going to happen under this proposal here?

Mr. Gray: I can reach my principals in three-quarters of an hour. I can let you know at least by tomorrow morning. [13]

Referee: If it is found that Lincoln Mining Company's title is under assignment of that contract, then, of course, you will give the contract direct to Lincoln Mining Company now.

Mr. Gray: Your Honor, I cannot. It is understood now I will not make any deal on time payment with anyone except with Mr. Pierce personally, and I so advised him.

Referee: I want to be sure that Lincoln Mining Company, with Mr. Pierce included as a stockholder, gets a satisfaction of that conditional sales contract.

Mr. Gray: We will be glad when we arrive at a figure but we are dealing with Mr. Pierce, not with Lincoln Mining Company, your Honor.

Referee: You are paying that out of your pocket, outside of any royalties, covered by a note?

Mr. Pierce: That was the intention, yes, sir.

Referee: All these payments on the Atolia contract by note, subject to the 10% royalty deduction from the first royalties.

Mr. Pierce: I would execute, as soon as I have the title on the conditional sales contract transferred to me—I'll issue that to the Lincoln Mining Company so they will own the machinery, in order to make my lien a valid one.

Referee: Is that with respect to the hoist also?

Mr. Pierce: Yes, sir.

Referee: Is that understood, Mr. Morse?

Mr. Morse: I don't know where we are getting at, your Honor. He's paying the money out, that's true, but he is taking it out of the royalties.

Referee: He'll get it back from the royalties.

Mr. Morse: So the ultimate people should pay it—the Koyens and Theriots and the stockholders of the Corporation.

Referee: That may be true provided he does not complete the term of his option. If he completes the term of his option, [14] he pays it himself.

Mr. Cannon: I don't see that there's any particular problem, Judge, because Mr. Pierce will claim no title in this machinery. He expects to pay \$6,000.00 for that machinery. Mr. Gray's problem is—he wants to look to Mr. Pierce for payment,

and not to the Corporation, which is acceptable. It is part of our proposal, and the title to the machinery, regardless of where it is now, when payment is made, would vest in the Corporation because the Corporation has executed a note securing that advance to Mr. Pierce, and he would thereafter be paid presumably out of the royalties.

Referee: Until such time, he would hold the total to the machinery and would substitute for Atolia, the owner, until some satisfactory agreement is made.

Mr. Cannon: That is correct, because the Corporation, by virtue of the provisions, is going to execute a mortgage to him anyway.

Mr. Morse: While we are on that subject, we will clarify it right now. What are the terms of that note we executed? When is it due? I had assumed that the note would be drawn in accordance with the lease; is that correct—and payable from the royalties paid under that lease?

Mr. Cannon: Will it be payable solely from those royalties?

Mr. Morse: That was my understanding. Page 6 provides that from the first royalties, the lessee shall repay himself from the loan.

Referee: That's where you get it.

Mr. Cannon: Mr. Morse's question was whether or not that Lessee would look solely to the royalties for payment of his moneys.

Referee: He has his note against the Atolia Mining Company but according to that paragraph, it

seems to me it will be paid [15] from the royalties. Is that your understanding of it?

Mr. Pierce: That's the intention, Judge, but the reason we asked for a promissory note was so that we would have a negotiable instrument, and if clauses are written into the note defining the source of payments, then I don't have a negotiable instrument.

Referee: The payment of the note is made from the royalties under the agreement of November 21, 1950, but I imagine Atolia Mining Company would have to be satisfied as to that. They will look to you for payment outside of the money due them of \$333.33, plus \$2,000.00, on which you will have to give a note to them to satisfy them. Then you become the owner of the Corporation and make payment to the Atolia Mining Company of \$2,000.00; is that right?

Mr. Pierce: Yes.

Referee: Section "C" of your offer—get that to me as quickly as you can because I want to get that to Court, too. I would like signed copies of these agreements tonight if I can get them.

Mr. Gray: I can give you by tomorrow morning—possibly this afternoon—an answer on this proposition made by Mr. Pierce.

Referee: I shall be in Court at 9:00 a.m.

Mr. Gray: I would also like to have some kind of an understanding of the petition for reclamation.

Referee: What do you suggest on that gentlemen? If satisfactory arrangements are made with

reference to the payment of that machinery, what's the use of going ahead with that petition?

Mr. Gray: I think it will be necessary to have a formal Order so as to pass a good title to Mr. Pierce.

Referee: It's very easy to have a separate petition. You gentlemen get together on that. I think you gentlemen ought to [16] stipulate that if Colonel Pierce goes through with this at this time—I haven't seen anything to convince me that the Lincoln Mining Company has much of a title. Would it be satisfactory to agree on the purchase of that machinery? Something has to be done on the reclamation.

Mr. Gray: We will have negotiations on this thing.

Referee: On the other, too, will you?

Mr. Morse: I really think they remain a part of amendment "C."

Referee: You are taking out your machinery on this deal if he gives you \$6,000.00.

Mr. Morse: In addition to that \$6,000.00, there is due for machinery, which the Corporation has, these other items.

Referee: \$1700.00.

Mr. Morse: Yes—\$767.00 and \$612.00.

Referee: Is due the Atolia Mining Company for additional machinery which is now on the property, and who bought that, and when?

Mr. Morse: One is a written contract of December 3, 1948. The Corporation was not in existence at that time.

Referee: So somebody else is responsible for that one. This meeting is recessed until 9:00 o'clock in the morning, and have two copies of the contract properly signed, and prepare an Order and submit it to the Court, and send me about three copies of that proposed Order, too. It is understood that as far as the claims that have been submitted to the Court today are concerned, they are not approved for the amounts except for the purpose of accepting the reorganization plan, and that I shall recommend to the Court that he put on a bar date for the filing of any claims against the Corporation that you gentlemen are not able to prove, and I hope that when you all get together, you will have a fine experience with your Lincoln Mining Company, but any creditor or [17] stockholder will be privileged to file objections to any claims which I have listed on that sheet which you have, as to the amount. Some of them which the Court objects to, we will set up a hearing on. See if we can get through with this thing without spending a lot of time on some of these claims. Some are all ready. I think that Mrs. Koyen's claim for board approximates the amount which was deducted from the payrolls.

Mr. Pierce: Yes, sir.

Referee: And there are others in the same category. As far as the Koyen claim for \$7,000.00 is concerned, and the Theriot Brothers, I desire to have a very careful investigation of those claims and when they were contracted—when did they deliver the work, and anything that was delivered prior to the 17th day of December, 1949, at which

time the Lincoln Mining Company was organized—will have to be very substantially justified because if it is said that the corporation assumed those obligations, then we want to know what the stockholders paid for their stock, but it may be necessary, as a matter of equity, to offset some of these claims against some of the stock—and that involves a lot of other things. You gentlemen are familiar with the fact that you cannot set up a dummy corporation and have all the benefits and none of its obligations. You can't put in rotten stuff in a corporation and ask someone to come in and make it gilt edge.

(Hearing recessed until November 22, 1950,  
at 9:00 o'clock.) [18]

Wednesday, November 22, 1950—9:00 o'clock A.M.

Referee: The Referee has been delivered two copies of the signed Proposed Lease and Option Agreement and Offer, and you are to submit a revised Paragraph "C" in your offer.

Mr. Cannon: That is correct, Judge. However, I would like to withdraw the offer made as the proposed Paragraph "C" yesterday, and will now make a new proposal for Paragraph "C," which I believe will be agreeable to all parties concerned.

Mr. Gray: I think, as far as we are concerned right now, just an oral statement—

Mr. Cannon: In lieu of Paragraph "C," we propose the following: To pay to the Atolia Mining Company the sum of \$7700.00 as payment in full of all claims of the Atolia Mining Company on conditional sales contract, open account, or oth-

erwise, against the debtor, Lincoln Mining Company, or any of the stockholders of said company individually, as set forth in the—

Referee: Let's confine that to the claims listed on the debtor's petition so we don't have anything to do with this other suit.

Mr. Cannon (Continuing): —amended plan of reorganization filed with said Court on the 6th day of November, 1950, on the following basis:

Referee: Is that your understanding of it, Mr. Gray?

Mr. Gray: My understanding is, the deal is \$7700.00 in payment of all claims and disputes between Atolia, Pacific Mining Company, Mr. Bradley, as President, and the Koyens and Theriots, and the Lincoln Mining Company, save and except that which is the basis of the suit now pending in the Seventh Judicial District [19] Court.

Mr. Morse: That's my understanding.

Mr. Cannon: Yes, that's right.

Mr. Morse: We settle once and for all this controversy this morning.

Referee: You are only settling those two items in the reorganization plan, and not anything else. Anything else has to be settled later when the Court sets the final date for filing claims.

Mr. Morse: That is true.

Mr. Cannon: That is correct.

Mr. Gray: I think that is all right. I think Mr. Morse and I can straighten out the other angle.

Referee: \$7700.00 worth of claims in reorganization.

Mr. Cannon: Let us get it straight now, because we want our offer to be accepted.

Mr. Gray: The only thing I am wondering about—you have here \$1700.00 open account; actually, that's the balance due on several open accounts between the parties and what I have agreed to accept on the balance on several open accounts.

Referee: And your offer is a compromise \$7700.00.

Mr. Gray: Everything except that which is involved in the suit in the Seventh District Court.

Mr. Cannon: Why couldn't we say this—add—"It is understood and agreed that all claims of the Atolia Mining Company shall be settled in full by this transaction, save and except those claims covered in that litigation now pending in the Seventh Judicial District Court between Koyen and the Theriots, et al., against the Atolia Mining Company, et al.

Referee: And identified and attached to Atolia Mining Company's petition.

Mr. Cannon: Now we are back to the basis of payment. [20] \$2500.00 cash upon the approval of this plan by the above-entitled Court; the balance of \$5200.00 to be paid in equal monthly payments of \$300.00 each, including principal, at the rate of 6% per annum on the unpaid balance, commencing the first day of the month following the approval of this reorganization plan by the above-entitled Court.

(Referee: The case referred to in that stipulation and agreement is: Wesley Koyen, Eva H. Koyen, G. W. Theriot, Dean P. Theriot and Winnifred E. Green, vs. Lincoln Mines, Inc., a Corporation, and Atolia Mining Company, a Corporation, (No. 3911, in the Seventh Judicial District Court of the State of Nevada).

Mr. Cannon: May I ask Mr. Gray if we may insert after the word "300," the words "or more"?

Mr. Gray: Absolutely.

Mr. Cannon: Insert the words "or more" after the word "300."

Mr. Gray: That's as I understood it. It is to be a promissory note executed by Mr. Pierce, secured by on the conditional sales agreement, on the personal property involved.

Referee: Upon the acceptance of that new chattel mortgage or conditional sales contract — the parties to release anything that is now on that machinery or anything of that kind so as to clean out all the claims and so as to get a title to Mr. Pierce on that deal; is that right?

Mr. Gray: Yes.

Referee: If you will initial this amendment, Mr. Morse, for this offer when Mr. Cannon prepares it, and send me up two or three copies so I can attach it in lieu of this Section "C" you have in this offer now, I will know it's what you want.

Mr. Cannon: There is one other matter that I want to call to the Court's attention so that everyone here will be familiar with it. Mr. Pierce and I went over the claims that are in the [21] files. It appears that the claims that have been filed,

including the amounts listed by the debtors in reorganization, amount to something in excess of \$12,000.00, exclusive of the Atolia Mining Company matter, and exclusive of the Clark County Wholesale conditional sales contract, so it would appear that the \$10,000 agreed to be advanced by Mr. Pierce is not sufficient to pay the claims in full that have either been filed or acknowledged. Now, that does not include the claims of the Koyens and the Theriots except for the claim of Mrs. Koyen for board, which is included in that figure, but it is in excess of \$12,300.00.

Referee: You understand, gentlemen, that those claims are for the purpose of accepting the reorganization plan — that the Court will set a definite date in the future for claims to be filed against the debtor corporation, and that you as representative of Mr. Pierce should file objections to any claims which are not on record or which subsequently are filed against the Lincoln Mining Company. If you and Mr. Morse can agree on any of these claims which you say are valid, then the Court will allow those and will set up the other claims on your objections for hearing to determine just exactly what they are, but you have to accept under the Court's Order. We do accept the claims filed and approved. They are only for the purpose of securing a desired number of claims under Section 179, and for voting purposes to accept the program. Undoubtedly, the Court will fix a time in the future for claims which were not included and, of course, couldn't be included in the original petition. There may be ad-

ministrative expenses and claims in the operation which should be applied.

Now, I wish you two would get together and attach the offer to an Order on what we have agreed on yesterday and today, and send them up to me so that I will be sure to get them in the Order which I will present to the Court for approval. I will [22] send you a copy of my report and recommendations, and to that will be attached the Order, and you will be given ten days in which to object to the form of my Order. If you don't object, it will be sign—affirmed, in other words. If you are in a hurry to get that in there, when I send you an Order which conforms to your ideas, you can immediately waive the statutory ten days and ask that it be signed forthwith. Be sure I have all your ideas in the Order for the Court to sign; and then I will put on the Findings—whatever the statutory form is—which will be in the form of Findings. I will have to re-write the thing in order to make it conform to the Court's ideas.

**Mr. Cannon:** Mr. Pierce has pointed out that in our last statement that those claims now exceed \$10,000.00. He wants it understood that the offer he has made is to loan not exceeding the sum of \$10,000.00 to pay all of those claims in full. Some adjustment must be made in the event there are more than \$10,000.00 of proven claims.

**Referee:** It would still be a debt against the corporation.

**Mr. Cannon:** That's the thing he doesn't want.

**Referee:** \$10,000.00 cannot be spread into

\$15,000.00 if there are that many claims approved. I don't know how many are going to be approved any more than you do but the claims which he has offered to pay will be submitted as they are to be approved by the Court. I understand that. That's the purpose of the thing, and that's what the acceptance is based upon. Those listed by the debtor should be approved. That's what their acceptance is based on, isn't it? I can't tell you whether there's going to be \$10,000 or \$9,000. I found one we thought was \$5,000, and it turned out to be \$3,100. If it's less than \$10,000.00—

Mr. Cannon: If it's more, that's all he is going to pay.

Referee: If he agrees or not, whatever the Court allows [23] he has to pay the administrative costs.

Mr. Cannon: Those costs are up to the Corporation.

Mr. Morse: We have nothing further, your Honor, at this time.

Referee: The matter will be recessed to the Referee's office for the purpose of any further Orders needed. As far as this matter is concerned, it will be recessed until December 15th here. In the meantime, if you have any petitions or anything you want to call to my attention, send them up on minimum notice. The reclamation hearing will be recessed over until the date of the acceptance of the plan.

Mr. Gray: If it's to be accepted.

Referee: That's indefinite.

Mr. Gray: Then until December 15th.

Referee: If the Atolia Mining Company and the debtor corporation enter into a stipulation or agreement, such as indicated in the modification of their offer, and this matter is approved by the Court without further ado, you gentlemen will agree by stipulation for the acceptance of the petition, excluding the rights of the debtor to the suit in the Seventh Judicial District Court, signed by Mr. Gray and Mr. Morse on behalf of the petition and the debtor corporation, if accompanied by sufficient copies of the stipulation so that I can send that out, too, with the Order.

Mr. Pierce, if this contract is approved while it is still in reorganization, you have to obtain supervision of it. I suggest you petition for the appointment of an attorney for the debtor. Mr. Grave's petition was rejected by reason of interest, and I imagine that you have no interest (to Mr. Cannon). You are not a stockholder or a director, and it might be well to have that set up in there. Since you can't have Mr. Morse. If you haven't any interest, you file that affidavit under Rule 44, and sign your petition as attorney for the debtor, as this matter is going to [24] last under reorganization, and we hope it will be sent back to you quickly, but we are going to have hearings on these claims, and I imagine we should have an attorney for the debtor on some of these claims.

Mr. Cannon: I may be disqualified by virtue of the fact that I represent the proposed lessee.

Referee: It may be. Look up that Rule 44, and

the appropriate Section in the Statute of Disqualification of Attorneys.

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Reporter's Certificate

I Hereby Certify that the foregoing is a true and correct transcript of my shorthand notes of the hearing in the above matter taken on November 21, 1950, and November 22, 1950.

/s/ LILLIAN D. LANE,  
Reporter.

[Endorsed]: Filed May 2, 1951. [25]

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[Title of District Court and Cause.]

PORTION OF HEARING ON DECEMBER 15,  
1950, RELATING TO CONFIRMATION OF  
PLAN OF REORGANIZATION

December 15, 1950, 10:00 A. M.

Before: Honorable Frank W. Ingram,  
Referee in Bankruptcy.

Appearances:

HAROLD M. MORSE, ESQ., on behalf of:  
JOHN S. HALLEY, ESQ., and  
MESSRS. MORSE and GRAVES,  
Attorneys for Debtor.

W. HOWARD GRAY, ESQ., on behalf of:  
MESSRS. GRAY & HORTON,  
Attorneys for Atolia Mining Co., et al.

HOWARD W. CANNON, ESQ.,  
Representing

G. McGUIRE PIERCE,

Proposed Lessee, and the Directors and Stockholders  
of Debtor Corporation.

Referee: The record will show that since our last meeting here on the acceptance of the plan of reorganization, on the 21st and 22nd of November, 1950, at which time the amended offer of reorganization was approved, the Court did, on the 28th day of November, 1950, issue an Order and approved the offer and amended plan of reorganization, and instructed, and noticed confirmation of plan on this day before the Referee and Special Master. Notice of such meeting under Section 174 of the Act of Congress, and the alternate Section 236-2, is noticed for this time and place, and the Referee's record indicates that such notice was mailed to all creditors and all parties of interest, and on the 28th day of November, 1950, made an Order setting this time and place for a hearing under those sections, and the record shows the approval of the agreement and contract between the debtor corporation on lease and option agreement, dated the 21st day of November, between the Lincoln Mining Company and one G. McGuire Pierce, who made the offer at the last meeting releasing option to purchase, which agreement was submitted

to the Court and approved by the Court on the 28th day of November, 1950.

The matter before the Court this morning is the confirmation, first, of the plan, under Sections 161 and 170 of the Act, and we now have before us the confirmation of the plan approved by the Court, and the meeting of creditors properly noticed.

Mr. Morse: At this time, your Honor, the Corporation files its objections to the confirmation of the proposed plan. I have served a copy upon Mr. Cannon, the counsel for Mr. Pierce.

(Mr. Morse delivers the Objections to the Referee.)

Mr. Cannon: I might raise one point for the clarification, at least, of myself. I do not believe that the Corporation, having accepted the proposal, and the Order of Confirmation having been entered by the Court, could reverse legally its position and legally object to the thing they have presented to the Court and asked the approval of the Court.

Referee: I think that you should be given an opportunity, inasmuch as your contract was approved by the Court, to raise objection to the filing of the objections, and I will have to bring it to the attention of the Court because I cannot hear that kind of an objection, so you can file your objection to the objections and hand it to the Court. Trustees and the Referee do not [2\*] hear that kind of a hearing; as long as that objection has been filed to the whole thing, and the Court wants to hear it, I will hear it. The Court sits in January.

\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

\* \* \*

I shall report the objection of the Lincoln Mining Company at this late date to the confirmation of the program with your answer, and I imagine the Court will hear that. Such being the situation this morning, I do not see how we can proceed any further on that, so we will go over to the other matters set for this time.

Mr. Morse: If the Court please, for the purpose of the record, I wish to state that the matters contained in the objections by the Corporation were brought to my attention yesterday. As attorney for the corporation, I was requested to act by the officers and the directors, and I deem it my duty to act, they not having time to secure other counsel.

Referee: And the Court may raise the issue that the objections were not taken at the proper time, too. I don't think you can come into Court with this kind of a proceeding. The people who filed the plan and the people who have signed the agreement are in no position to now object because they found somebody else; but that's the expression of the Referee, and not the Court. The matter will go over, and I will report to the Judge, and it will probably be set for January.

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Mr. Cannon: May the record show, on behalf of Mr. Pierce, the proponent in this matter, that we are prepared at this time, and are willing, to proceed under the Order heretofore granted by the Court on our proposal, and we are also prepared to tender into the trust fund the funds agreed

upon, of \$10,000 in payment of the creditors' claims, and we are prepared further to proceed on the Atolia Mining Company, which is the assumption of their obligation in the total sum of \$7700, and we are also prepared to proceed with the payment of the stipulated sums on account of the Clark County Wholesale for the property sold heretofore under conditional sales contract. [3]

Referee: The record will so show.

\* \* \*

It Is Ordered that the meeting for confirmation of plan be continued and recessed over until 10:00 a.m., February 2, 1951, in the United States Courtroom, Las Vegas, Nevada, and that any other meetings of stockholders or creditors under Sections 160, 171 and 174 shall be continued and recessed over until such date.

#### Reporter's Certificate

I Hereby Certify that the foregoing is a true and correct transcript of my shorthand notes of the hearing in the above matter taken on December 15, 1950, insofar as the hearing on that day related to confirmation of plan of reorganization.

/s/ LILLIAN D. LANE,  
Reporter.

[Endorsed]: Filed May 2, 1951. [4]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY UPON APPEAL  
FILED APRIL 7, 1951

Pursuant to Rule 75-D of Rules of Civil Procedure the appellant makes the following concise statement of points upon which he intends to rely upon this appeal:

I.

The order, judgment and decree of the Court was erroneous in that it ordered, adjudged and decreed that the confirmation of the amended and approved plan or reorganization referred to therein be refused. It should have ordered that the said plan be confirmed.

II.

The order, judgment and decree of the Court was erroneous in that it decreed that the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc., and G. McGuire Pierce be rejected, and in that it decreed said lease and option agreement to be null and void and of no effect.

III.

The order, judgment and decree of the Court was erroneous in decreeing as follows:

“That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him

for injuries resulting from the rejection of said plan and the cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.”

Such portion of said order was erroneous in that:

(a) Said lease mentioned therein should not have been cancelled nor should the plan have been rejected;

(b) Said lease and option agreement was a lease and option agreement executed by the debtor corporation pursuant to an order of the Court approving the same and the rejection and cancellation of said lease ought not to have been ordered;

(c) If the Court could properly have ordered the cancellation and rejection of said lease and option agreement (which is denied by this appellant) said portion of said judgment, order and decree improperly limited the Referee in Bankruptcy in determining the proper amount to be paid G. McGuire Pierce as reimbursement for injury resulting from said rejection and cancellation in that in finding number (8) of the decree of the Court it is provided:

“That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant to said plan.”

and did not provide for the damages that would be sustained by the lessee by such rejection and cancellation.

#### IV.

The portion of the order, judgment and decree set forth in paragraph (4) under the caption, "It Is Ordered, Adjudged and Decreed," was erroneous in that it decreed a course of procedure to be followed upon the refusal of confirmation of the plan and rejection and cancellation of the lease and option agreement to G. McGuire Pierce whereas the order, judgment and decree should have confirmed the plan and should not have rejected or cancelled the said lease and agreement and the procedure thereafter following should have been in accordance with the National Bankruptcy Act. Said portion of said order is likewise erroneous in respect to the provisions relating to reimbursement to G. McGuire Pierce for the same reasons as set forth in paragraph III of this statement of points upon which appellant will rely upon appeal.

#### V.

The order, judgment and decree of the Court was erroneous in that the Court did not state separately or at all its conclusions of law in compliance with Rule 52-A of the Rules of Civil Procedure. The said order, judgment and decree of the Court was erroneous in that the findings of fact were not sufficient to sustain the decree that the confirmation of the said plan should be refused and were not

sufficient to justify or permit the Court to reject and cancel the said lease and option agreement entered into between the debtor and G. McGuire Pierce.

## VI.

The order, judgment and decree of the Court was erroneous in that the Court failed and refused to adopt all of the findings of fact of the Referee and Special Master and his recommendations.

## VII.

The order, judgment and decree of the Court was erroneous in that the findings of fact on which said order, judgment and decree is based were erroneous in the following particulars:

(a) The findings of fact should have been those recommended by the Special Master and Referee;

(b) It is not true that the acceptance of the modified plan by the officers, directors and stockholders of said debtor corporation was made without full and careful consideration of the best interests of the corporation, its stockholders and its creditors;

(c) While it is true that work requirements by specific language of the said lease require only work or labor required under the laws of the United States and the State of Nevada on unpatented mining claims, it is nevertheless true that as an implied part of the lease the lessee would be required to perform work or labor or the absence of such would constitute an abandonment of the lease. Conse-

quently it is not true that the lessee could remain in control of and in possession of the properties of the debtor corporation for as long as forty years or any unreasonable length of time without performing work or labor other than that so required under the laws of the United States and the State of Nevada.

(d) It is not true that the plan of reorganization approved by the Judge of said United States District Court on November 29, 1950, under the conditions as they now exist is not fair and equitable.

(e) Finding number (8) is erroneous in that the lessee under said lease is entitled to the full benefits conferred upon him as lessee under said lease and not merely to moneys expended by him in furtherance of or pursuant to the plan of reorganization.

(f) Finding number (10) is erroneous in that it failed to adopt finding number (3) of the Referee and Special Master and is further erroneous in finding that the plan approved will not insure commencement of the operation of the property and will place it within the power of the lessee to refrain from operation of the property for as long as forty years.

(g) The findings of fact upon which said order,

judgment and decree is based are not supported and not justified by the evidence in the case.

Dated: This 20th day of April, 1951.

Respectfully submitted,

HAWKINS & CANNON,

KYLE Z. GRAINGER,

By /s/ KYLE Z. GRAINGER,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of District Court and Cause.]

**CERTIFICATE OF CLERK  
TO RECORD ON APPEAL**

United States of America,

District of Nevada—ss.

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the following and accompanying documents and exhibits, listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled matter, and that they constitute the record on appeal herein as designated by the parties:

Names and Addresses of Attorneys of Record.

Debtor's Petition for Corporate Reorganization.

Order Approving Petition.

Order Continuing Petitioner in Possession of Its Property, and Restraining Order.

Order of Reference to Frank W. Ingram.

Proposal of Plan for the Reorganization of Lincoln Mining Company, Inc., Debtor, With Plan of Reorganization attached thereto, filed June 30, 1950.

Supplement to Proposal of Plan for Reorganization of Lincoln Mining Company, Inc., Debtor, filed July 14, 1950.

Order for Hearing of Objections or Amendments to Plan Proposed by Debtor in Possession under Section 170 of Bankruptcy Act and to Continuance and to Hearing Objections, if any, to the Continuance of the Debtor in Possession under Section 162 of said Act, filed July 27, 1950.

Order Approving Plan of Reorganization, filed September 26, 1950, to which is attached Report of Referee and Special Master on Hearings on Objections of Amendments to Plan under Section 170 and for Continuance of Debtor in Possession under Section 162 of Bankruptcy Act, filed September 22, 1950, with copy of Plan of Reorganization attached.

Proposal of Plan for Reorganization of Lincoln Mining Company, Inc., Debtor, filed November 6, 1950, to which is attached Plan of

Reorganization, submitted by G. W. Thiriot, President of Lincoln Mining Company, Inc.

Order filed November 6, 1950, ordering that new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., be considered and treated as a modification of the plan heretofore approved September 26, 1950, and fixing November 21, 1950, for consideration of such new plan, etc.

Order Extending Time for filing of claims and acceptances and for hearing objections to alteration and modification of plan and for confirmation of such altered plan and for notices of hearings thereon, Signed by Referee, and dated November 6, 1950.

Offer to Debtor in Reorganization, signed by G. McGuire Pierce, filed November 29, 1950.

Amended Offer to Debtor in Reorganization, filed November 29, 1950, attached to above-mentioned offer.

Lease and Option Agreement, filed November 29, 1950, attached to above-mentioned offer and amended offer.

Findings and Report of Referee, filed November 29, 1950.

Order Approving Offer and Plan of Reorganization signed by Judge Foley, filed November 29, 1950.

Order Fixing Hearings on Confirmation of Plan and Dismissal of Proceedings or Adjudication and Providing for Notice thereof, filed November 29, 1950.

Referee and Special Master's Report on Objections to Confirmation of Plan by Debtor Corporation and Reply to Objection by G. McGuire Pierce, Lessee, and Findings Thereon, filed December 21, 1950.

Objections by Lincoln Mining Company, Inc., Debtor, to approval or Confirmation of the Altered and Modified Plan of G. McGuire Pierce, attached to above-mentioned Referee and Special Master's Report.

Reply to Objections by Lincoln Mining Company, Inc., Debtor, to Approval or Confirmation of the Altered and Modified Plan of G. McGuire Pierce, attached to above-mentioned Referee and Special Master's Report.

Order to Show Cause for Order Confirming Plan of Reorganization Notwithstanding Objections of Debtor, filed Dec. 29, 1950.

Minutes of Court of January 9, 1951.

Minutes of Court of February 5, 1951.

Minutes of Court of February 12, 1951.

Minutes of Court of February 19, 1951.

Minutes of Court of February 26, 1951.

Minutes of Court of March 9, 1951.

Docket Entries of January 9, 1951; February 5, 1951; February 12, 1951; February 19, 1951; February 26, 1951, and March 13, 1951.

Findings of Fact and Order Refusing Confirmation of Plan, filed March 9, 1951.

Notice of Appeal, filed April 7, 1951.

Stipulation of Portions of the Record, Proceedings and Evidence to Be Contained in the Record on Appeal, filed April 30, 1951.

Cost Bond on Appeal, filed April 7, 1951.

Stipulation of Certain Facts for Use on Appeal, filed April 30, 1951.

Reporter's Transcript on Hearing on Objections to Altered Plan, filed May 2, 1951.

Reporter's Transcript entitled "Portion of Hearing on December 15, 1950, Relating to Confirmation of Plan of Reorganization," filed May 2, 1951.

Statement of Points Upon Which Appellant Will Rely Upon Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said United States District Court this 10th day of May, A.D. 1951.

[Seal] AMOS P. DICKEY,  
Clerk.

By /s/ O. F. PRATT,  
Deputy Clerk.

---

[Endorsed]: No. 12924. United States Court of Appeals for the Ninth Circuit. G. McGuire Pierce, Appellant, vs. Lincoln Mining Company, Inc., a Corporation, Debtor, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed May 14, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 12924

In the Matter of:

LINCOLN MINING COMPANY, INC., a  
Corporation,

Debtor,

G. MC GUIRE PIERCE,

Appellant,

vs.

LINCOLN MINING COMPANY, INC., a Corpora-  
tion, Debtor,

Appellee.

CONCISE STATEMENT OF POINTS ON AP-  
PEAL AND DESIGNATION OF RECORD  
NECESSARY FOR CONSIDERATION  
THEREOF AND TO BE PRINTEDTo: The Honorable United States Court of Appeals  
for the Ninth Circuit:For his concise statement of points on which the  
appellant intends to rely, the appellant adopts the  
statement of points heretofore filed with the Clerk  
of the United States District Court for Nevada.The Appellant hereby designates the entire record  
on appeal certified by the Clerk of said United  
States District Court, as necessary for the consid-  
eration of the appeal in this cause and to be printed.

The within document is to be printed as part of

the record, in addition to those items already designated; all filing stamps shall appear in the printed record, but the titles of the Court and the cause, and the names and addresses of attorneys appearing above the captions shall be omitted in printing.

Dated: This 17th day of May, 1951.

HAWKINS AND CANNON,

By /s/ HOWARD W. CANNON,

/s/ KYLE Z. GRAINGER,

Attorneys for Appellant.

The above is hereby approved.

JOHN S. HALLEY, ESQ.,

MORSE AND GRAVES,

By /s/ HAROLD M. MORSE,

Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 18, 1951.



No. 12,924

United States Court of Appeals  
For the Ninth Circuit

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In the Matter of

LINCOLN MINING COMPANY, INC. (a  
corporation),

Debtor.

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G. McGuire Pierce,

*Appellant,*

vs.

LINCOLN MINING COMPANY, INC. (a cor-  
poration),

*Appellee.*

---

**NOTICE OF MOTION TO DISMISS APPEAL**

**and**

**MEMORANDUM IN SUPPORT THEREOF.**

---

MORSE & GRAVES,

25 Fremont Street, Las Vegas, Nevada,

*Attorneys for Appellee  
and Movant.*

FILED

JUL 4 1951



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No. 12,924

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of

LINCOLN MINING COMPANY, INC. (a corporation),

Debtor.

G. MC GUIRE PIERCE,

vs.

*Appellant,*

LINCOLN MINING COMPANY, INC. (a corporation),

*Appellee.*

**NOTICE OF MOTION TO DISMISS APPEAL.**

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To the Honorable William Denman, Chief Judge, and to the Honorable Associates Judges of the United States Court of Appeals for the Ninth Circuit:

To G. MC GUIRE PIERCE, Appellant:

To HAWKINS AND CANNON, 125 South Second Street, Las Vegas, Nevada, and KYLE Z. GRAINGER, Esq., 830 H. W. Hellman Building, 354 South Spring Street, Los Angeles 13, California, Attorneys for Appellant:

YOU, AND EACH ONE OF YOU, will please take notice that on Monday, the 30th day of July, 1951, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, in the courtroom of the above entitled Court, in the City of San Francisco, State of California, Lincoln Mining Company, Inc., Debtor and Appellee will move the Honorable United States Court of Appeals for the Ninth Circuit for an Order dismissing the appeal of G. McGuire Pierce from that Order refusing confirmation of plan made and entered in the United States District Court for the District of Nevada, in the action therein pending, on the 9th day of March, 1951.

Said motion will be made, based and grounded upon the following reasons, to wit:

1. That G. McGuire Pierce is not a party to the action and has no appealable interest and has no right of appeal.
2. That G. McGuire Pierce is not a stockholder, creditor, or otherwise interested in these proceedings.
3. That G. McGuire Pierce's only appearance in this action was his letter to George W. Thiriot, president of the Lincoln Mining Company, Inc., which formed the basis of the amended plan of reorganization, all under date of November 6, 1950.
4. That upon the final hearing by the court below of the confirmation of the plan it was disaffirmed and the proceedings dismissed.

For the convenience of this Honorable Court, and also due to the fact that the record on appeal has

not yet been printed at the date this motion is drawn, we quote *in haec verba* the Findings of Fact and Order Refusing Confirmation of Plan, made and entered on the 9th day of March, 1951, at Las Vegas, Nevada; and also the Order of Respondent Court, dated April 5, 1951:

In the District Court of the United States of America,  
in and for the District of Nevada.

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In the Matter of Lincoln Mining Company, Inc., Debtor.	}	In Reorganization No. A-60-A
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### FINDINGS OF FACT AND ORDER REFUSING CONFIRMATION OF PLAN.

“The order of the judge approving a plan, as provided in section 574 of this title, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan.”  
**11 U.S.C.A. § 580.**

“The plan of reorganization must be ‘fair and equitable.’ Such is the mandate of the statute (11 U.S.C.A. § 621).” Petition of Portland Electric Power Co., 9 Cir., 162 F. 2d 618.

In reorganization proceedings the purpose is rehabilitation of the debtor and to preserve it as a going concern if possible; therefore, it is vital that favorable leases be held and unfavorable leases be

rejected. Title Insurance & Guaranty Co. v. Hart,  
9 Cir., 160 F. 2d 961.

Sec. 116 of Chapter X (11 U.S.C.A. § 516(1)) gives the judge power to permit the rejection of executory contracts. The term "executory contracts" includes leases. 11 U.S.C.A. § 506(7).

"In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter \* \* \* any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor." 11 U.S.C.A. § 602.

This case came on to be heard on the 12th day of February, 1951, pursuant to the Order of this Court of December 29, 1950, directing Lincoln Mining Company, Inc., Debtor, to show cause on the 2d day of March, 1951, at 10:00 o'clock in the forenoon of that day at the courtroom of the above entitled Court in the United States Post Office and Courthouse at Las Vegas, Nevada, why the amended and approved plan of reorganization should not be confirmed notwithstanding the objections of the debtor corporation filed December 15, 1950. By consent of counsel the date of hearing of said Order to Show Cause was advanced to February 12, 1951, by order entered upon the minutes of this Court and the said hearing commencing on the 12th day of February, 1951, was continued from time to time until this date.

Having considered the said objections of the debtor corporation filed December 15, 1950, and the reply

thereto of G. McGuire Pierce filed December 19, 1950, together with the Report of the Referee and Special Master on said objections and reply, the Court hereby makes findings of fact as follows:

#### FINDINGS OF FACT.

1. The Court accepts the Referee and Special Master's Finding No. 1 and No. 2.
2. That on or about the 6th day of November, 1950, by order of this Court the new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., was considered and treated as the modification of the plan heretofore approved September 26, 1950, and the Court ordered that such new plan be filed as such modification and fixed the 21st day of November, 1950, at 9:30 a. m. as the time and the courtroom of the United States District Court at Las Vegas, Nevada, as the place for the consideration of such new plan or modification and for the hearing of objections thereto.

That the proposed modification of the original plan filed herein by G. W. Thiriot November 6, 1950, included therein as Paragraph V the following:

“Mr. George McGuire Pierce, 6057 Maryland Drive, Los Angeles, California 36, makes the proposition to pay off the indebtedness of Lincoln Mining Company Inc., in return for a bond and lease on the property, buildings, machinery, etc., for a period of ten (10) years. A total purchase price of \$150,000.00 payable from royalties at the rate of 10% on net returns to apply

on purchase price. A contract to be worked out and executed if sanctioned by the court."

3. That on the 21st day of November, 1950, and at the place set for the consideration of said modified plan, the said G. McGuire Pierce, without prior notice to the corporation or its officers or stockholders or any of the creditors of the corporation, presented a written proposal to said corporation which is summarized as follows:

The said corporation be directed to issue 75,000 shares of its capital stock, held and unissued by said corporation as treasury stock, to the said G. McGuire Pierce; that a lease had been prepared on the mining property, the property of this corporation, by the attorneys representing the said G. McGuire Pierce, and was presented to the officers of this corporation for their signature on said date, the 21st day of November, 1950; and that the said G. McGuire Pierce would pay in cash to the Atolia Mining Company the sum of \$7700.00 to secure a full release from said company of all of their claims against the debtor corporation; that he would advance the sum of \$10,000.00 to pay all of the remaining creditors of the debtor corporation; that present at said court hearing before the Referee and Special Master were all the officers and directors of the debtor corporation, and as they were then and there informed by the said G. McGuire Pierce that the lease he had drawn and his proposal were final insofar as he was concerned, the said officers and directors of said corporation and its stockholders, therefore, accepted said

modified plan. That said acceptance was made without full and careful consideration of the best interests of the corporation, its stockholders, and its creditors.

4. That on the 29th day of November, 1950, with the consent of all the parties hereto and without objection of the debtor corporation, Lincoln Mining Company, Inc., the Judge of this Court made and entered an Order approving offer and plan of reorganization, said plan of reorganization being in substance the offer to debtor in reorganization filed in the office of the Clerk of the above entitled Court November 29, 1950; that said plan so approved included a lease and option agreement entered into November 21, 1950, between the debtor corporation as lessor and G. McGuire Pierce as lessee. That by virtue of said lease the lessor leased all of the patented and unpatented mining claims therein described for a period of 20 years commencing on the 25th day of November, 1950, and continuing to the 24th day of November, 1970, with the privilege of renewal for a further period of 20 years. That for the use and occupation of the leased premises, the lessee was to pay lessor a rental or royalty from the net returns of ore or other products of said leased premises. That by the terms of said lease the lessee is given an option to purchase the leased premises for the total purchase price of \$150,000.00. That no work requirements are contained in said lease or plan of reorganization and by the terms of said lease and plan of reorganization the lessee could remain

in control of and in possession of all of the properties of the said debtor corporation described in said lease for as long as 40 years without performing work or labor on said mining property other than that which from time to time might be required under the laws of the United States and the State of Nevada and on the unpatented mining claims described in the lease.

That if work and labor were not performed upon said property, and particularly upon the patented mining claims described in said lease, the property would deteriorate in value and become of little or no value to said debtor corporation or to the stock-holders of said corporation.

5. That said plan provides in addition to the lease above mentioned that the debtor corporation shall transfer free and clear to the lessor, G. McGuire Pierce, 75,000 shares of the treasury stock of the said corporation; that the capital stock authorized to be issued by said corporation is 300,000 shares of stock, and said plan further provides that the said lessee shall have a first claim for all royalties due under the lease until lessee has been repaid all sums advanced to said debtor as provided for in said plan.

6. That the debtor corporation now finds itself financially able to pay all legal claims against it including the claim of the Atolia Mining Company for machinery and equipment and the administrative expenses incurred in these proceedings; and upon the hearing of this Order to Show Cause, the debtor corporation exhibited its ability and willingness to

immediately pay claims of creditors and satisfy the claim of the Atolia Mining Company and the administrative expenses incurred in these proceedings, and exhibited its ability and willingness to make reasonable reimbursement to G. McGuire Pierce for monies actually expended after November 29, 1950, in furtherance of and pursuant to said plan.

7. That the plan of reorganization approved by the Judge of this Court November 29, 1950, under the conditions as they now exist is not fair or equitable.

8. That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant to said plan.

9. That with the Order to Show Cause herein there was served the Findings and Report of the Referee and Special Master to which was attached the objections by Lincoln Mining Company, Inc., Debtor, to confirmation of the modified plan of G. McGuire Pierce, said objections having been filed with the Referee and Special Master December 15, 1950.

10. As to Finding No. 3 of the Referee and Special Master, the Court will not adopt such finding for the reason that it appears to the Court that the plan approved will not insure commencement of the operation of the property and said plan would

place it within the power of the lessee to refrain from operation of the property for as long as 40 years.

It is therefore Ordered, Adjudged and Decreed:

1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is, refused.
2. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc. and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.
3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.
4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court

will, after hearing upon notice to the debtor, stockholders, and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings as in the opinion of the Judge may be for the interests of creditors.

The Court reserves jurisdiction of these proceedings to make such other and further order under the Bankruptcy Act as to the Court may seem just and proper.

Dated: This 9th day of March, 1951, at Las Vegas, Nevada.

/s/ Roger T. Foley,  
United States District Judge.

In the United States District Court for  
the District of Nevada.

---

In the Matter of  
Lincoln Mining Company, Inc.,  
Debtor.

In Reorganization  
No. A-60-A

**ORDER OF REFERENCE**

It appearing to the Court that in the "Findings of Fact and Order Refusing Confirmation of Plan" filed herein on March 9, 1951, it was ordered, among other things, as follows: "That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement".

It now appearing that no agreement has been reached between the debtor and G. McGuire Pierce, and that the time heretofore allowed for such an agreement has now expired,

It is Ordered that these proceedings be, and the same hereby are referred to Frank W. Ingram, Esq., Referee in Bankruptcy, for the purpose of hearing

and considering and determining the proper amount to be paid to G. McGuire Pierce as reimbursement for injuries resulting from the rejection of the plan and cancellation of the lease referred to in the "Findings of Fact and Order Refusing Confirmation of Plan".

Dated this 5th day of April, 1951.

Roger T. Foley,

U. S. District Judge.

Filed April 5, 1951,

Amos P. Dickey, Clerk.

By O. F. Pratt,

Deputy.

That it affirmatively appears from the records and files herein:

- (a) That all of the creditors of the debtor corporation have been paid by the corporation.
- (b) That all the expenses of these proceedings have been paid by the debtor corporation.
- (c) That the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court.
- (d) That G. McGuire Pierce refused to comply with that order of Court of the 9th day of March, 1951 and April 5, 1951 for adjudication of his claim, if any, for reimbursement for his expenses, if any. He thereby waived any claim he may have had, and has no right under the Bankruptcy Act to a hearing of his alleged claim in this Court.

(e) That for all the above reasons all questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court and the dismissal of the proceedings by the respondent Court.

Dated, Las Vegas, Nevada,  
July 18, 1951.

Respectfully submitted,

MORSE & GRAVES,

By HAROLD M. MORSE,

*Attorneys for Appellee  
and Movant.*

No. 12,924

**United States Court of Appeals  
For the Ninth Circuit**

---

In the Matter of

LINCOLN MINING COMPANY, INC. (a  
corporation),

Debtor.

G. McGuire Pierce,

vs.

*Appellant,*

LINCOLN MINING COMPANY, INC. (a cor-  
poration),

*Appellee.*

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.**

---

**I.**

That G. McGuire Pierce is not a party to these proceedings, nor is he a stockholder of this debtor corporation, nor is he a creditor of this corporation. There is a fundamental rule of law that a party who has no interest in the subject matter or proceedings cannot appeal.

## II.

That the only relationship between this debtor corporation and G. McGuire Pierce, appellant, resulted when G. McGuire Pierce wrote a letter to George W. Thiriot, president of debtor corporation, which resulted in the modification of the original plan of reorganization filed on November 6, 1950 by George W. Thiriot, president of debtor corporation, to the Referee in Bankruptcy, to which reference is made to the Findings of Fact and Conclusions of Law in the respondent Court.

---

## III.

That subsequently thereto, and at the time and place set for the consideration of the modified plan, G. McGuire Pierce, without prior notice to the debtor corporation, its officers, stockholders, or any creditors of the corporation, presented a written proposal to the debtor corporation, as found and considered in the respondent Court's Findings of Fact and Conclusions of Law, to which reference is hereby made. That at the time and place set for the confirmation of this plan by the Referee, to wit, December 15, 1950, debtor corporation filed its objections to the confirmation and requested a dismissal of the reorganization proceedings.

That at the time and place set by the respondent Court to show cause why said altered plan should be

confirmed, notwithstanding the objection of debtor corporation, the respondent Court made its order refusing to confirm the said amended and approved plan of reorganization.

The debtor corporation respectfully submits to this Honorable Court that in view of the foregoing facts, G. McGuire Pierce, appellant, not being a creditor, stockholder or officer of this corporation, does not have the right to appeal.

---

#### IV.

This Honorable Court has said in *Loomis v. Gila County* (C.C.A., Arizona, 1939), 103 F. (2d) 312, certiorari denied 59 S. Ct. 1041, 307 U.S. 643, 83 L. Ed. 1524, that in corporate reorganization proceedings, where a party is not interested in the proceedings or aggrieved by the order of dismissal, he has no right of appeal and the appeal, therefore, must be dismissed.

In the *Loomis* case above referred to there was a reorganization proceeding where a trustee was appointed and upon confirmation of a proposed plan of reorganization the Court dismissed the proceedings; there was no creditor appealing, stockholder appealing, nor was the debtor corporation appealing. The trustee appealed the order of dismissal and this Honorable Court dismissed the appeal.

## V.

Section 116 of Chapter 10 of the Bankruptcy Act (11 U.S.C.A., § 516(1)) gives the judge power to permit the rejection of executory contracts. The term "executory contracts" includes leases. (11 U.S.C.A., § 506(7).)

That G. McGuire Pierce has refused to comply with that order of the respondent Court of the 9th day of March, 1951 and April 5, 1951, for adjudication of his claim, if any; for reimbursement of his expenses, if any, and he therefore has waived any claim he may have had and has no right under the Bankruptcy Act to a hearing on his alleged claim to this Court.

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## VI.

That the debtor corporation has been unable to find any adjudicated case with the same factual situation involved in this appeal. The debtor corporation respectfully submits to this Honorable Court that since all the creditors of this corporation have been paid by this corporation and the expenses of these proceedings have been paid by the corporation, the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court; that all the questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court,

and the dismissal of the proceedings by the respondent Court.

Dated, Las Vegas, Nevada,  
July 18, 1951.

Respectfully submitted,  
**MORSE & GRAVES,**  
By HAROLD M. MORSE,  
*Attorneys for Appellee  
and Movant.*



No. 12,924

IN THE

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

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In the Matter of

LINCOLN MINING COMPANY, INC., a corporation,  
Debtor.

---

G. MC GUIRE PIERCE,

*Appellant,*

*vs.*

LINCOLN MINING COMPANY, INC., a corporation,

*Appellee.*

---

**POINTS AND AUTHORITIES IN OPPOSITION  
TO MOTION TO DISMISS APPEAL.**

---

HAWKINS & CANNON,

125 South Second Street,  
Las Vegas, Nevada,

KYLE Z. GRAINGER,

354 South Spring Street,  
Los Angeles 13, California,

*Attorneys for Appellant.*



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No. 12,924

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

---

In the Matter of

LINCOLN MINING COMPANY, INC., a corporation,  
Debtor.

---

G. McGuire Pierce,

*Appellant,*

*vs.*

LINCOLN MINING COMPANY, INC., a corporation,

*Appellee.*

---

## POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS APPEAL.

---

G. McGuire Pierce, appellant in this proceeding, now files herein his points and authorities in opposition to motion of Lincoln Mining Company, Inc., debtor and appellee, for an order dismissing the appeal of G. McGuire Pierce in the above entitled proceeding.

The motion of said appellee is based upon the following grounds as set forth in the notice of motion, to wit:

1. That G. McGuire Pierce is not a party to the action and has no appealable interest and has no right of appeal.

2. That G. McGuire Pierce is not a stockholder, creditor, or otherwise interested in these proceedings.
3. That G. McGuire Pierce's only appearance in this action was his letter to George W. Thiriot, President of the Lincoln Mining Company, Inc., which formed the basis of the amended plan of reorganization, all under date of November 6, 1951.
4. That upon the final hearing by the court below of the confirmation of the plan it was disaffirmed and the proceedings dismissed.

I.

**Under This Subdivision, Answer Is Made to Points  
1, 2 and 3 Above Set Forth.**

An examination of the record will disclose that the above points are not well grounded. It is not correct to say that G. McGuire Pierce's only appearance in this action was a letter to George W. Thiriot, President of Lincoln Mining Company, Inc. The facts in this case in respect to the interest of G. McGuire Pierce are as follows:

On November 21, 1950, G. McGuire Pierce made a written offer to the debtor corporation [Tr. p. 56] wherein he offered to lend moneys to that corporation to pay its preferred and unsecured obligations, to assume a certain secured claim of the Clark County Wholesale Mercantile Co., Inc., and to post a surety bond to insure payment to the Atolia Mining Company of sums asserted to be owing by it and which claim is in litigation. By the terms of said offer a note was to be executed evidencing the said sums,

which note was to be secured by a chattel and realty mortgage on the mining properties owned by the debtor. It was likewise provided in said offer that the debtor was to execute a lease and option in accordance with the copy of same attached to the offer, and provided further that the debtor should transfer to said G. McGuire Pierce seventy-five (75) shares of treasury stock then held by debtor corporation. This offer was amended in writing to provide a different mode of settlement in respect to the Atolia Mining Company claim to comply with the wishes of the Atolia Mining Company. [Tr. p. 74.]

At a meeting of creditors on November 21, 1950, the offer of G. McGuire Pierce was presented for consideration to the interested parties. [Tr. p. 136.] At said meeting a modified plan submitted by the President of said debtor corporation and based on the offer of said G. McGuire Pierce, was also presented for consideration to the creditors and interested parties. After the matter of the offer had been heard during the morning session of the Court, a recess was had until 2 o'clock p. m. at which time Mr. Morse, attorney for debtor corporation, asked and received permission of the court to talk over the lease with the interested parties. Upon resumption of the hearing Mr. Morse stated that it was the opinion of the Board of Directors that the lease be signed [Tr. p. 142], and the Referee at that time said:

“ . . . Mr. Morse announces that the offer to the debtor in reorganization, with a copy of the proposed agreement, has been accepted by the stockholders. Have you signed the lease and option agreement?”

To this statement Mr. Morse responded:

“No, but we will do so your Honor.”

On November 28, 1950, the Referee made his findings and reports and submitted same to the Honorable Judge of the United States District Court. [Tr. p. 76.] Among other things, he found and reported that G. McGuire Pierce had submitted the offer hereinbefore referred to and that said offer and the corporate acceptance of same was just and equitable and that an order attached as prepared by the parties, might be signed *ex parte* as all had had copies. [Tr. p. 79.]

On November 29, 1950, the Honorable Judge of the District Court signed an order approving the offer to the debtor in reorganization, as amended, made to the debtor by G. McGuire Pierce, and ordered that the lease and option, entered into on November 21, 1951, be approved, and authorized the debtor and lessee to proceed in accordance with said lease. It was also ordered that the said Pierce and the said debtor proceed to comply with the other matters provided for in the offer. [Tr. p. 82.] This order was signed with the consent of all the parties and without objection of the debtor corporation. [Tr. p. 117.] A modified plan of reorganization as aforesaid was filed by G. W. Thiriot, President of the Debtor Corporation and the Debtor organization [Tr. p. 48] which was based upon matters and things contained in the offer of said Pierce. On December 15, 1950, the Lincoln Mining Company, Inc., debtor, filed objections to the confirmation of the said modified plan [Tr. p. 94] and in said instrument likewise asked that the lease theretofore given to G. McGuire Pierce be declared null and void. G. McGuire Pierce without objection and with the consent of the Court filed a reply to said pleading of the Lincoln Mining Company, Inc., Debtor. [Tr. p. 167.] Later hearings were had before the Honorable Judge at which hearings debtor was

represented by counsel and G. McGuire Pierce was represented by counsel without any objection being made to such appearance. The order which is subject matter of the appeal resulted from such hearings. After the Findings of Fact the said order reads as follows [Tr. p. 120] :

“1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is refused.

“2. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc., and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.

“3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.

“4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court will, after hearing upon notice to the debtor, stockholders and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing the bankruptcy be proceeded with or dismissing the

proceedings as in the opinion of the Judge may be for the interests of creditors.

"The Court reserved jurisdiction of these proceedings to make such other and further orders under the Bankruptcy Act as to the Court may seem just and proper.

"Dated: This 9th day of March, 1951, at Las Vegas, Nevada.

s/ ROGER T. FOLEY,  
United States District Judge.

(Endorsed:) Filed March 9, 1951."

In findings of fact preceding the order Finding 8 provides as follows:

"8. That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant of said plan."

If it should be found that the lease entered into with the approval of the Court could be rejected and cancelled, the portion of the order relative to the determination of the proper amount to be paid to G. McGuire Pierce improperly limits the amount to be paid to monies actually expended in furtherance of and pursuant to the plan instead of an amount covering damages for loss of the full benefits of the lease of which he was deprived.

We think the foregoing statement of facts discloses that the statement under Point 3 of Appellee's reasons for motion, namely, that G. McGuire Pierce's only appearance in this action was a letter to George W. Thiriot,

President of Lincoln Mining Company, Inc. is far from correct, and further is a complete answer to points 1, 2 and 3 in the enumeration of reasons for the granting of the motion.

It appears that a lease and option was entered into between the debtor corporation and G. McGuire Pierce subject to the approval of the court and that thereafter the court not only approved the lease and option and the offer of G. McGuire Pierce but directed that parties proceed in accordance therewith. No appeal was ever taken from said order. The court had ample authority to make the order. Section 116 of Chapter X of the Bankruptcy Act in enumerating certain of the jurisdictional powers of the judge provides in subdivision 3 that the judge may:

“. . . authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;”

This provision restates the substance of form 77-B(c) (3½).

*Frank et al. v. Drinc-o-Matic* (C. C. A. 2d), 136 F. 2d 906;

*Herbert Glassman v. Philadelphia Rapid Transit Co., et al.*, (C. C. A. 3d), 82 F. 2d 397;

*In the Matter of Warner Quinlan Co., Inc.*, Debtor D. C. (So. Dist. of N. Y.), 17 Fed. Supp. 659.

and numerous other cases cited in Collier's on Bankruptcy 14th Ed. Vol. 6, pp. 726-732 are also authority in respect to a lease or sale of debtor's property.

It is this lease wherein G. McGuire Pierce is the lessee, that the order appealed from rejects and declares null and void. It is impossible, as we see it, that the property rights of a party could be invaded as above set forth yet that party be not an interested party.

## II.

### **Under This Subdivision, Answer Is Made to Point 4 of the Appellee's Reasons Upon Which His Mo- tion Is Based.**

This ground for the granting of the motion is that upon the final hearing by the court below of the confirmation of the plan, it was disaffirmed and the proceedings dismissed. It is true that by the order appealed from confirmation of the plan was refused but the bankruptcy proceedings have not been dismissed. We have hereinbefore quoted the order of the court and in subdivision 4 thereof it will be noted that the order provided that the judge of the court, after notice to the debtor, stockholders and creditors then remaining unpaid, will enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings, as in the opinion of the judge may be for the best interest of creditors. No order of dismissal can of course be properly entered until the determination of this appeal.

### III.

#### Answer to Various Points Set Forth in the Notice of Motion to Dismiss Appeal.

On pages 13 and 14 of the notice of motion, we find the following:

“That it affirmatively appears from the records and files herein:

(a) That all of the creditors of the debtor corporation have been paid by the corporation.

(b) That all the expenses of these proceedings have been paid by the debtor corporation.

(c) That the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court.

(d) That G. McGuire Pierce refused to comply with the order of Court of the 9th day of March, 1951 and April 5, 1951 for adjudication of his claim, if any, for reimbursement for his expenses, if any. He thereby waived any claim he may have had, and has no right under the Bankruptcy Act to a hearing of his alleged claim in this Court.

(e) That for all the above reasons all questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court and the dismissal of the proceedings by the respondent Court.”

In respect to subdivisions (a) and (b) above set forth, assuredly it is not within the power of the corporation by voluntarily paying its creditors and the expenses of these proceedings to preclude this appellant from asserting his property rights. If appellant's lease is upheld it may be that the money to be paid creditors should be paid over to the debtor corporation to reimburse it for payment that otherwise would have been made by appellant.

In respect to subdivision (c), the motion of the debtor corporation that this proceeding be dismissed must await the result of this appeal.

In respect to subdivision (d), it is urged that appellant G. McGuire Pierce has refused to comply with the order of the court on the 9th of March, 1951, being the order appealed from in this proceeding, and an order dated the 5th of April, 1951 for adjudication of his claim, if any, to reimbursement for his expenses, if any, and thereby has waived any claim he may have had. The order of the court dated the 5th day of April, 1951 is set forth on pages 12 and 13 of appellee's notice of motion. Under this order it was directed that proceedings be referred to Frank W. Ingram, Esquire, Referee in Bankruptcy for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as reimbursement for injuries resulting from the rejection of the plan and cancellation of the lease referred to and the findings of fact and order refusing confirmation of plan. Appellant G. McGuire Pierce has not refused to comply with the order of the court of the 9th of March, 1951 or of the order of court of April 5, 1951 other than that he has taken an appeal from the order of the 9th day of March, 1951 and the order of the 5th day of April, 1951, which was in furtherance of the order of the 9th day of March, 1951, is merely held in abeyance as to any hearings by the Honorable Referee in Bankruptcy until the determination of this appeal.

In respect to subdivision (e) that all questions in this case have become moot, we need call attention only to the various questions presented on the appeal. No dismissal of the proceedings should be had until this appeal is heard, for otherwise property rights of the appellant would be invaded.

#### IV.

#### Questions Involved in This Appeal Which Make G. McGuire Pierce, Appellant Herein, a Proper Ap- pellant.

(a) G. McGuire Pierce was the lessee under a lease entered into between the corporation and himself after the approval of the debtor's original petition for reorganization. Said lease also contained an option agreement. The order, judgment and decree of the Court appealed from, rejected this lease and option agreement and decreed that same was null and void and of no effect. Without objection and with the consent of the court, appellant urged that the court could not properly make such a decree. In connection with this point the question also arises whether Section 116 of the Bankruptcy Act, subdivision (1), in relation to executory contracts of the debtor permits the rejection of executory contracts entered into in the course of administration of the debtor's estate or is confined to the rejection of executory contracts of the debtor entered into prior to the approval of the petition.

(b) The order, judgment and decree of the court decreed that reimbursement should be paid to G. McGuire Pierce for injuries resulting from the cancellation of said lease but by the findings of fact limited said reimbursement to moneys actually expended in furtherance of and pursuant to said plan and did not provide for the full dam-

ages that would be sustained by the lessee by such rejection and cancellation. If the court could properly cancel the lease and option agreement, the question then arises was the court in error in so limiting the amount of damages to be paid. If Section 116 of Ch. X of the Bankruptcy Act is properly applicable to lease made pursuant to order of court after the approval of the debtor's original petition, then by the terms of Section 202 said G. McGuire Pierce would become a creditor with full right of appeal. That section provides as follows:

“In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter . . . any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor.”

U. S. C. A. Par. 602.

(c) The order, judgment and decree of the Court decreed that the confirmation of the amended plan of reorganization be refused.

In the working out of the consideration to be paid by appellant to the corporation, the confusion that would arise as to the method of payment if the plan were not confirmed, gave appellant a direct interest in the question of the confirmation and he was accorded the right to file his reply by the court and without objection participated in the proceedings relating to the confirmation of the plan. Furthermore, if the construction of the Honorable Trial Judge is correct that the clause of Section 116 relating to executory contracts is applicable then appellant is a creditor entitled to appeal from an order relating to confirmation. In our appeal we contend that the court had no right

by virtue of said section to reject and cancel said lease and option agreement but contend further if it is held that the court did have such right under said section that we are entitled to receive reimbursement and damages in a greater amount than provided by the order of the court.

### Conclusion.

We submit that the foregoing shows that G. McGuire Pierce, the appellant herein, was a party directly interested in the proceeding and in a far different position than that of the trustee referred to in the case of *Loomis v. Gila County* (C. C. A. 9th), 103 F. 2d 312, cited by appellee and assuredly both by permission of court and direct interest was entitled to protect his property rights. It is not consonant with the American concept of justice that a man's property may be taken from him without the right on his part to have his day in Court.

Respectfully submitted,

HAWKINS & CANNON,

KYLE Z. GRAINGER,

By KYLE Z. GRAINGER,

*Attorneys for Appellant.*



No. 12932.

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

---

SAMUEL D. COLLINS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

REPLY BRIEF OF APPELLEE.

---

ERNEST A. TOLIN,

*United States Attorney,*

RAY H. KINNISON,

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*Chief of Criminal Division,*

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No. 12932.

IN THE

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

---

SAMUEL D. COLLINS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**REPLY BRIEF OF APPELLEE.**

---

**Jurisdictional Statement.**

The jurisdiction of this Court is contested.

**Statement of the Case.**

The appellant on August 15, 1947, pleaded guilty to an Information on file in accordance with his waiver as to the counts I and II charging violation of Section 145(b) of the Internal Revenue Code, and entered a plea of not guilty to the counts III and IV charging violation of Section 145(c) of the Internal Revenue Code. The appellant was represented by counsel and entered a plea of guilty to counts I and II and was sentenced to eighteen months in a federal penitentiary upon count I and the same on count II, sentences to run consecutively.

The appellant appealed from an Order denying a Motion to vacate the judgment and for leave to withdraw his plea of guilty. The Order denying said Motion was affirmed by this Court on August 22, 1949, in Case No. 11929, Collins v. U. S., 176 F. 2d 773, which record on appeal, all briefs and the decision of the Court are hereby incorporated by reference as though fully set forth herein.

Thereafter, on September 27, 1949, the Mandate of this Court was filed in the District Court.

On November 2, 1950, the appellant filed a Motion to vacate or modify the sentence in the District Court [R. 2, 3 and 4]. This was heard without argument on November 2, 1950, and the District Court denied the Motion [R. 5]. On November 7, 1950, appellant filed a Notice of Appeal [R. 6].

## ARGUMENT.

### I.

#### The District Court Did Not Have Jurisdiction to Entertain the Motion.

Appellant's Motion appears to be a renewal of his Motion previously made to the District Court to vacate his conviction and withdraw his plea of guilty. This Motion was the subject of his prior appeal which affirmed his conviction and is reported in 176 F. 2d 773, certiorari denied 338 U. S. 943. The Mandate was filed in the District Court on September 27, 1949, and the Motion to vacate was not filed until November 2, 1950 [R. 5]. Therefore, the appellant's Motion to vacate or modify the sentence was made more than sixty days after the receipt by the District Court of the Mandate of the Court of Appeals affirming the judgment and the District Court did not have jurisdiction to entertain the Motion.

See

Federal Rules of Criminal Procedure, Rule 35;  
*United States ex rel. Quinn v. Hunter*, 7 Cir., 162 F. 2d 644, 647, 648.

### II.

#### The Sentence Was Not Contrary to Law.

The appellant assigns as error that the sentence of the federal court must have a definite starting time. Section 3568, Title 18, United States Code, provides that sentence of imprisonment shall commence to run from the date on which such person is received at the penitentiary for serv-

ice of such sentence, and this Court answered the identical contention in the case of *Hayden v. Warden*, 9 Cir., 124 F. 2d 514, where it stated:

“The court below could properly order the sentence to run consecutively with another sentence and such a sentence is not too uncertain.”

See also,

*Hunter v. Martin*, 334 U. S. 302.

### III.

#### The Waiver of Indictment and Filing of Information in Felony Cases Is Provided by Rule 7(b), Rules of Criminal Procedure.

Appellant contends that the conviction was obtained upon a plea of guilty to an Information without first being indicted by a grand jury. The defendant waived an indictment and consented to the filing of an Information. The Information served the same function as an indictment in apprising the appellant of the crime with which he was charged.

*Fippin, et al. v. United States*, 9 Cir., 162 F. 2d 128, 131.

The constitutionality of Rule 7(b), Rules of Criminal Procedure, which has been promulgated by the Supreme Court, has been approved in subsequently decided cases.

*Fippin, et al. v. United States*, 9 Cir., 162 F. 2d 128, 131;

*United States v. Martin*, 8 F. R. D. 89, affirmed 168 F. 2d 1003, 4 Cir., cert. den. 335 U. S. 872.

All the provisions of the Fifth Amendment may be waived.

*Barkman v. Sanford*, 5 Cir., 162 F. 2d 592, 593, cert. den. 332 U. S. 816.

Appellant further contends that proof of his guilt is necessary to support his conviction and sentence after his plea of guilty. The contention is answered in the case of *Berg v. United States*, 9 Cir., 176 F. 2d 122, 125, cert. den. 338 U. S. 876, where it is said:

“by a plea of guilty, \* \* \* all defenses are waived and the prosecution is relieved from the duty of proving any facts. The effect is the same as if the defendant had been tried before a jury and been found guilty upon evidence covering all material facts.”

### Conclusion.

1. The District Court did not have jurisdiction to hear appellee's Motion.
2. There is no merit to any of the errors designated by the appellant.

Respectfully submitted,

ERNEST A. TOLIN,  
*United States Attorney*,

RAY H. KINNISON,  
*Assistant United States Attorney*,  
*Chief of Criminal Division*,

BERNARD B. LAVEN,  
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*Attorneys for Appellee, United States of America.*



No. 12937

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

MARYLAND CASUALTY COMPANY, a Corporation,

Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Appellees.

---

Transcript of Record

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Appeal from the United States District Court,  
for the District of Oregon

FILED

RECEIVED  
MAY - 1965

RECEIVED  
MAY - 1965



No. 12937

---

United States  
Court of Appeals  
for the Ninth Circuit.

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MARYLAND CASUALTY COMPANY, a Corporation,

Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON, Doing Business as PARAMOUNT SERVICE,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
for the District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States  
for the District of Oregon

No. Civ. 5419

MARYLAND CASUALTY COMPANY, a Cor-  
poration,

Plaintiff,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Defendants.

### COMPLAINT

Comes Now the plaintiff and for its cause of action against the above-named defendants Complains and Alleges as follows:

#### I.

At all times herein mentioned plaintiff was and is a corporation incorporated under the laws of the State of Maryland and is duly qualified, empowered and admitted to engage in the insurance business in the states of California and Oregon, and is so engaged; and was and is duly authorized to write workmen's compensation insurance in the State of California to insure employers against liability for workmen's compensation and was and is so engaged; and the defendants, Sidney F. Paton and Lois Eleanor Paton, are citizens of the State of

California doing business as co-partners under the assumed name and style of Paramount Service. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

On or about the 16th day of September, 1947, one James Buie was employed by one James T. Moore, doing business as the Quaker Pacific Rubber Company, under a contract of employment made in the State of California between the said James Buie and said James T. Moore.

## III.

The functions and duties of the said James Buie under the said contract of employment were those of a traveling salesman operating within the State of Oregon.

## IV.

The defendants Sidney F. Paton and Lois Eleanor Paton are residents and citizens of the State of California, and are co-partners doing business as, and under the assumed name and style of, Paramount Service. The said defendants, did, within the State of Oregon, employ one or more persons, conduct business operations and maintain business facilities; and more particularly did own a 1942 G.M.C. motor truck bearing 1947 Oregon license plate number T3937 and did operate said motor truck by and through their employee and agent, one Lucius W. Hereford, upon the highways

of the State of Oregon at and prior to the time of the accident more particularly described herein-after.

## V.

During all times herein mentioned that highway commonly known as the "Lower Columbia River Highway" extended and now extends in a general easterly and westerly direction between the cities of Astoria and Portland, in the State of Oregon; that said highway is a part of the Oregon State Highway system and is in general use for public and private vehicular travel; that said highway is a duly dedicated public highway, and is in excess of 21 feet in width and is paved and is divided into two lanes of traffic by means of a painted stripe or line in the center of the said highway, the north lane being intended for west-bound traffic and the south lane for east-bound traffic.

## VI.

While acting in and pursuant to the scope and course of his employment by the said Quaker Pacific Rubber Company and in direct performance of his duties as such employee, the said James Buie was, on or about the 2nd day of October, 1947, at about the hour of 11:30 o'clock a.m. of said day, driving and operating a motor vehicle in a westerly direction on and along the said "Lower Columbia River Highway"; and the said James Buie had driven to and reached a point on said Highway about four miles northwesterly of the town of

Rainier, Columbia County, Oregon, at which time and place the said Lucius W. Hereford, driving defendants' said 1942 G.M.C. motor truck in an easterly direction along and upon the said Lower Columbia River Highway in the course and scope of his, the said Hereford's employment, negligently drove the said motor truck across said center line and into the lane for west-bound traffic then occupied by the motor vehicle being driven by the said James Buie, and into and against the vehicle operated and occupied by the said James Buie, and the said James Buie then and there suffered injuries to his person from which, as a direct and proximate result thereof, he died on the said 2nd day of October, 1947.

## VII.

That the direct and proximate cause of the fatal injuries thus sustained by the said James Buie was the carelessness, recklessness and negligence of the defendants, acting by and through their duly appointed and acting employee and agent, namely, the said Lucius W. Hereford, in the following particulars, to wit:

(a) That the said Lucius W. Hereford failed to operate and drive the said 1942 G.M.C. motor truck upon the right or south side of the said center line of said two-lane Lower Columbia River Highway while the same was available for travel.

(b) That the said Lucius W. Hereford failed to operate and drive said 1942 GMC

motor truck to the right side of the center line of the said highway and give at least one-half of the main-travelled portion thereof to the approaching automobile then and there being driven and operated by the said James Buie.

(c) In driving and operating said 1942 GMC motor truck out of the right lane and into the left lane of traffic without first ascertaining that such movement could be made with safety and without endangering other members of the travelling public and particularly the approaching automobile then being operated by the said James Buie.

(d) In failing to keep a proper or any lookout to ascertain the presence of automobiles approaching from the opposite direction, and particularly for the automobile then being operated by the said James Buie.

(e) At said time and place in failing to have or keep the said 1942 GMC motor truck under proper or any control so as to be able to control and properly guide or direct the said 1942 GMC motor truck and to stop the same within a reasonable space of time and distance.

(f) In operating said 1942 GMC motor truck at said time and place at a greater speed than was reasonable and prudent having due regard to visibility, traffic, surface, contour and width of said highway at the point of the said collision and the hazard and other conditions then and there existing and at a rate than was

greater than would permit him to exercise proper control of said 1942 GMC motor truck and to decrease the speed and to stop the same in order to avoid a collision with the automobile then being operated by the said James Buie.

(g) In failing to yield or give the right of way to the said automobile which was then being operated by the said James Buie, which was at said time and place being operated in the right hand lane designated for traffic proceeding in a general westerly direction.

## VIII.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of said State and duly approved by the Governor thereof:

Section 111 of the Labor Code of the State of California provides in part as follows, to wit:

“The Industrial Accident Commission, consisting of seven members, shall exercise all judicial powers, including those vested in it under Sections 4903, 5301, and 5307 of this code.”

Section 114 of the Labor Code of the State of California provides as follows, to wit:

“The commission shall be composed of two panels of three members each. The members shall be assigned to the panels by the chairman

and may be transferred from one panel to another by the chairman to facilitate the work of the commission. The chairman may act in the place of any member of a panel who is absent, or whose office has become vacant."

\* \* \*

"Except as otherwise expressly provided, each of the panels shall have the power to hear and determine matters within the jurisdiction of the commission. The commission shall by rule provide for a geographical division of the State to determine what matters are to be heard and decided by each panel. Particular matters may be transferred from one panel to another, or to the commission as a whole, by an order signed by four members of the commission. In any case in which the commission acts as a whole, the act of four members shall be considered the act of the commission."

Section 133 of the Labor Code of the State of California provides as follows, to wit:

"The commission shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code."

Section 3204 of the Labor Code of the State of California provides as follows, to wit:

"Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division."

Section 3211 of the Labor Code of the State of California provides as follows, to wit:

“‘Insurer’ includes the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or inter-insurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued.”

Section 3501 of the Labor Code of the State of California provides in part as follows, to wit:

“The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury.”

Section 3600 of the Labor Code of the State of California provides as follows, to wit:

“Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

“(a) Where, at the time of the injury, both

the employer and the employee are subject to the compensation provisions of this division.

“(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

“(c) Where the injury is proximately caused by the employment, either with or without negligence.

“(d) Where the injury is not caused by the intoxication of the injured employee.

“(e) Where the injury is not intentionally self-inflicted.”

Section 3700 of the Labor Code of the State of California provides in part as follows, to wit:

“Every employer except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

“(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this State.”

Section 4701 of the Labor Code of the State of California provides as follows, to wit:

“Where an injury causes death, either with or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for:

“(a) Reasonable expenses of the employee’s burial, not exceeding \$300.

“(b) A death benefit, to be allowed to the

dependents when the employee leaves any person dependent upon him for support."

Section 4702 of the Labor Code of the State of California provides in part as follows, to wit:

"The death benefit shall be a sum sufficient to equal:

"(a) In a case of total dependency, four times the average annual earnings of the deceased employee.

\* \* \*

"The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month, unless the commission otherwise orders. Except as provided in the next paragraph the death benefit, when added to all accrued disability indemnity, shall not exceed four times the average annual earnings of the employee, nor exceed the sum of six thousand dollars (\$6,000) except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars (\$7,500) and except as otherwise provided in Sections 4553 and 4554. For a total dependency the minimum death benefit shall be three thousand dollars (\$3,000)."

Section 4703 of the Labor Code of the State of California provides in part as follows, to wit:

"Subject to the provisions of section 4704,

this section shall determine the right to a death benefit.

"If there is any person wholly dependent for support upon a deceased employee, such person shall receive the entire death benefit, and any person partially dependent shall receive no part thereof."

Section 4903 of the Labor Code of the State of California provides in part as follows, to wit:

"The commission may determine, and allow as a lien against any amount to be paid as compensation:

"(a) Attorney's Fee and Disbursements. A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith.

\* \* \*

"(d) Burial Expenses. The reasonable burial expenses of the deceased employee, not to exceed the amount provided for by Section 4701."

Section 4905 of the Labor Code of the State of California provides as follows, to wit:

"Where it appears in any proceeding pending before the commission that a lien should be allowed if it had been duly requested by the party entitled thereto, the commission may, without any request for such lien having been made, order the payment of the claim to be

made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award."

Section 5300 of the Labor Code of the State of California provides as follows, to wit:

"All the following proceedings shall be instituted before the commission and not elsewhere, except as otherwise provided in Divisions IV and V.

"(a) For the recovery of compensation, or concerning any right of liability arising out of or incidental thereto.

"(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

"(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

"(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

"(e) For obtaining any order which by Divisions IV and V the commission is authorized to make.

"(f) For the determination of any other

matter, jurisdiction over which is vested by Divisions IV and V in the commission."

Section 5301 of the Labor Code of the State of California provides as follows, to wit:

"The commission is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in section 5300 subject only to the review by the courts as specified in this division. Such jurisdiction may be exercised by the commission through either of its panels as described in Section 115 or, subject to the approval by the panel of the order, decision, or award, through a commissioner or referee."

Section 5302 of the Labor Code of the State of California provides as follows, to wit:

"All orders, rules, findings, decisions, and awards of the commission shall be *prima facie* lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division."

Section 5303 of the Labor Code of the State of California provides as follows, to wit:

"There is but one cause of action for each injury coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion

of the commission, be joined in the same proceeding at any time."

Section 5307.5 of the Labor Code of the State of California provides as follows, to wit:

"The commission or a panel, a commissioner, or a referee may: \* \* \* Provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, or otherwise."

Section 5800 of the Labor Code of the State of California provides as follows, to wit:

"After final hearing by the commission, it shall, within thirty days, make and file:

"(a) Its findings upon all facts involved in the controversy.

"(b) Its order, decision, or award stating its determination as to the rights of the parties. All awards of the commission either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil action on all due and unpaid payments from the date of the making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable."

Section 5801 of the Labor Code of the State of California provides as follows, to wit:

"The commission in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order payment thereof during the continuance of disability."

Section 3753 of the Labor Code of the State of California provides as follows, to wit:

"The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation."

## IX.

The said James Buie left surviving him a lawful widow, Norma Buie, a citizen and resident of the State of California, the said Norma Buie being dependent upon the said James Buie for her support, and being the sole lawful dependent of the said James Buie at the time of his, the said James Buie's death.

## X.

That the said Quaker Pacific Rubber Company, employer of the said James Buie, as aforesaid, was,

and the said James Buie also was, subject to the provisions of the Workmen's Compensation Laws of the State of California at and before the time of the injury and death of the said James Buie as hereinabove described; and the said Quaker Pacific Rubber Company did, prior to the accident between the said James Buie and the defendants' agent, Lucius W. Hereford, as hereinabove more particularly described, enter into a contract of insurance with the plaintiff Maryland Casualty Company, the said contract being commonly termed a "Standard Workmen's Compensation and Employer's Liability Policy." This said contract and policy of insurance was in full force and effect during all times mentioned herein, and under and by its terms and provisions the said Maryland Casualty Company did undertake to insure the said Quaker Pacific Rubber Company against liability for workmen's compensation claims and awards.

## XI.

That the said Norma Buie, widow of the deceased James Buie, applied for and claimed compensation and death benefits on account of the death as aforesaid of the said James Buie, in proceedings instituted and maintained by her before the Industrial Accident Commission of the State of California; that the said proceedings were named and designated as follows, to wit:

Claim Number 112-327; Norma Buie, Applicant, vs. James T. Moore, doing business under the firm name and style of Quaker Pa-

cific Rubber Company and Maryland Casualty Company, Defendants.

That the said Industrial Accident Commission of the State of California had jurisdiction to receive, adjudicate and decide upon the said claim and application of the said Norma Buie; and that a hearing and determination was had thereupon; and that the said Industrial Accident Commission of the State of California did, on or about the 3rd day of November, 1948, make and enter the following award in compliance with law, to wit:

“Award Is Made in favor of Norma Buie against Maryland Casualty Company of a death benefit in the total sum of \$6,000.00, payable at the rate of \$28.50 weekly, beginning October 3, 1947, and continuing weekly thereafter until the whole of the award shall have been paid, less credit for any payments made on account thereof, and less the sum of \$400.00, together with any prosecution expenses incurred and paid, to John H. Black and Henry Schaldach, as attorneys’ fee.

“It Is Ordered that jurisdiction be, and it is, hereby reserved to fix the reasonable value of medical expense, if any, incurred to relieve deceased of the effects of his injury herein.

“It Is Further Ordered that jurisdiction be, and it is, hereby reserved to award the statutory burial expense upon petition first filed therefor by interested parties.

“It Is Further Ordered that this Award shall

carry interest pursuant to the provisions of Section 5800 (b) of the Labor Code."

## XII.

That thereafter, on the 24th day of November, 1948, the said Industrial Accident Commission did, in proceedings upon the same matter, award unto the said Norma Buie the further sum of \$300.00, the same being an award for expenses of the burial of the said James Buie.

## XIII.

That by virtue of the awards made unto the said Norma Buie, by the said Industrial Accident Commission of the State of California, on account of the death of the said James Buie, all as aforesaid, the plaintiff Maryland Casualty Company has become obligated to pay, and has in part paid, the total sum of \$6,300.00, which sum is the total of the awards of compensation made by the said Industrial Accident Commission of the State of California.

## XIV.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 3204 of the Labor Code of the State of California provides as follows, to wit:

"Unless the context otherwise requires, the definitions hereinafter set forth in this chapter

shall govern the construction and meaning of the terms and phrases used in this division."

Section 3209 of the Labor Code of the State of California provides as follows, to wit:

"‘Damages’ means the recovery allowed in an action at law as contrasted with compensation.”

Section 3210 of the Labor Code of the State of California provides as follows, to wit:

"‘Person’ includes an individual, firm, voluntary association, or a public, quasi public, or private corporation.”

Section 3850 of the Labor Code of the State of California provides as follows, to wit:

"As used in this chapter:

"(a) ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.

"(b) ‘Employer’ includes insurer as defined in this division.”

Section 3851 of the Labor Code of the State of California provides as follows, to wit:

"The death of the employee or of any other person, does not abate any right of action established by this chapter.”

Section 3852 of the Labor Code of the State of California provides as follows, to wit:

"The claim of an employee for compensation does not affect his claim or right of action for

all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

Section 3853 of the Labor Code of the State of California provides as follows, to wit:

"If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently."

Section 3854 of the Labor Code of the State of California provides in part as follows, to wit:

"If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee

is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, \* \* \* the employer shall pay any excess to the injured employee or other person entitled thereto."

Section 3855 of the Labor Code of the State of California provides as follows, to wit:

"If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages."

Section 3857 of the Labor Code of the State of California provides as follows, to wit:

"The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."

## XV.

That as a proximate result of the injury and death of the said James Buie, and as a proximate

result of the negligence of the defendants acting by and through their agent, Lucius W. Hereford, as aforesaid, the plaintiff Maryland Casualty Company, has been damaged by the defendants in the sum of \$6,300.00, this sum being the amount of compensation which the plaintiff is obligated to pay, and has in part paid, to the said Norma Buie, widow of the said James Buie, on account of the injuries and death negligently inflicted upon the said James Buie by the defendants' agent and employee, the said Lucius W. Hereford.

Wherefore, plaintiff demands judgment against the defendants, and each of them, in the sum of \$6,300.00, and for its costs and disbursements incurred herein.

CAKE, JAUREGUY & TOOZE,  
/s/ DWIGHT L. SCHWAB,  
/s/ DENTON G. BURDICK, JR.,  
/s/ LAMAR TOOZE, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 3, 1950.

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[Title of District Court and Cause.]

#### MOTION FOR SUMMARY JUDGMENT

Come Now the defendants and move this Court for a summary judgment in their favor as to all of the complaint and action, and that said action be

dismissed with costs and disbursements. This motion is made pursuant to Rule 56 (b), Federal Rules of Civil Procedure.

The defendants will contend that the action is barred by Section 8-903, Oregon Compiled Laws Annotated, and that it affirmatively appears from the complaint that whatever cause of action exists herein accrued on the 2nd day of October, 1947, and that the Statute creating the right of action provides that the action must be commenced within two years. Further, that it affirmatively appears that this action was not commenced until May 25, 1950.

/s/ L. A. RECKEN,  
SENN, RECKEN & RECKEN,  
Attorneys for Defendants.

I, L. A. Recken, one of the attorneys for the defendants herein, do hereby certify that I make the foregoing motion for summary judgment, that said motion is, in my opinion, well founded in law and is made in good faith and not made for purposes of delay herein.

/s/ L. A. RECKEN.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of motion and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said motion, in my opinion, is well founded in law.

Dated July 6, 1950.

/s/ L. A. RECKEN,

Of Attorneys for Defendants.

State of Oregon,  
County of Multnomah—ss.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this .... day of July, 1950.

/s/ DENTON G. BURDICK, JR.,

Of Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1950.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Come Now the defendants, by L. A. Recken and Senn, Recken & Recken, Attorneys at Law, and move the Court to dismiss the above-entitled action pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure, because the complaint fails to state a claim against the defendants upon which relief can be granted.

/s/ L. A. RECKEN,

SENN, RECKEN & RECKEN,

Attorneys for Defendants.

## Points and Authorities Relief Upon by Defendants

It affirmatively appears from the complaint in this cause that the action is based on negligence by reason of the death of one James Buie. That said death is alleged to have occurred by reason of the tortious acts of one Lucius W. Hereford. That said death occurred in Columbia County, Oregon, on the 2nd day of October, 1947. That the Statute of Limitations in the State of Oregon, to wit: Section 8-903, Oregon Compiled Laws Annotated, provides that said action shall be commenced within two years from the date of the death, and the right to bring said action expired on the 3rd day of October, 1949. That said action above was commenced on the 25th day of May, 1950, in this Court.

I, L. A. Recken, one of the attorneys for the defendants herein, do hereby certify that I make the foregoing motion to dismiss, that said motion is, in my opinion, well founded in law and is made in good faith and not made for purposes of delay herein.

/s/ L. A. RECKEN.

Receipt of copy acknowledged.

[Endorsed]: Filed July 10, 1950.

[Title of District Court and Cause.]

### PRE-TRIAL ORDER

This Matter came on for hearing before the Honorable James Alger Fee, Chief Judge of this Court, presiding; plaintiff appearing by one of its attorneys, Denton G. Burdick, Jr., and defendants appearing by one of their attorneys, L. A. Recken; the said hearing being conducted upon defendants' motion for summary judgment and defendants' motion to dismiss; and

It appearing to the Court that the defendants' motion for summary judgment is based on the assertion that plaintiff's action is barred by Section 8-903, O.C.L.A.; and

It appearing to the Court that the defendants' motion to dismiss is based upon the assertion that the plaintiff's complaint fails to state a claim upon which relief can be granted; and

It appearing to the Court that the issues raised by the defendants' motions as aforesaid should be resolved on the basis of an agreed statement of the facts of this action relating to those issues, prior to the trial of this case upon the factual question whether the conduct of the defendants through their agent was negligent or culpable,

The Court ordered that a pre-trial order be drawn reciting the admitted facts upon which the defendants' said motions can be decided; and that the legal issues involved therein be expressed.

Pursuant to the order of the Court, it is agreed,

admitted and represented by the litigants that the following are:

### Agreed Statement of Facts

#### I.

At all times herein mentioned plaintiff was and now is a Maryland corporation legally doing an insurance business in California and Oregon, and was and now is legally authorized to write workmen's compensation insurance in the State of California.

#### II.

That James Buie was employed by James T. Moore, doing business as the Quaker Pacific Rubber Company, under a contract of employment wherein the said James Buie was employed and, at the time of the accident herein involved, was working as a travelling salesman operating within the State of Oregon.

#### III.

That the said James Buie was a resident and inhabitant of the State of Oregon, living in the City of Portland, Oregon, and his duties and employment were solely within the State of Oregon.

#### IV.

That the defendants, Sidney F. Paton and Lois Eleanor Paton, were residents and citizens of the State of California and are co-partners doing business under the name and style of Paramount Serv-

ice, and that the said defendants did employ within the State of Oregon a certain employee named Lucius W. Hereford whose work and employment consisted of operating a 1942 G.M.C. motor truck bearing 1947 Oregon license plate No. T-3937. That the said Lucius W. Hereford's duties and employment were solely in the State of Oregon, and at all times herein mentioned the said Hereford acted in the course and scope of his employment and as agent for the defendants.

## V.

That the said James Buie in the course and scope of his employment did own and operate his Buick automobile which was licensed under the laws of the State of Oregon.

## VI.

That the Lower Columbia River Highway is a public highway in Columbia County, Oregon.

## VII.

That on October 2, 1947, James Buie in the course and scope of his employment was driving his Buick automobile in a westerly direction on and along the Lower Columbia River Highway, and at a point about four miles northwesterly of the town of Rainier in Columbia County, Oregon, a collision occurred between the truck of the defendants above described and which was driven by Lucius W. Hereford and the automobile of the said James

Buie; and as a result of which collision the said James Buie died on the 2nd day of October, 1947.

### VIII.

That thereafter Norma Buie, a citizen and resident of the State of California and the lawful widow of James Buie and claiming to be dependent upon the said James Buie, made claim under the provisions of the Workmen's Compensation Laws of the State of California. That the said James T. Moore, doing business as the Quaker Pacific Rubber Company, employer of the said James Buie, was subject to the provisions of the Workmen's Compensation Laws of the State of California. That the said Maryland Casualty Company, the plaintiff, had previous to the 2nd day of October, 1947, entered into an insurance contract with the said James T. Moore, doing business as the Quaker Pacific Rubber Company, and under which contract the Maryland Casualty Company undertook to insure the said James T. Moore, doing business as The Quaker Pacific Rubber Company, against liability for Workmen's Compensation claims and awards, which contract was in full force and effect during all the times herein mentioned.

### IX.

That the Industrial Accident Commission of the State of California did, between the 2nd day of November, 1948, and the 25th day of November, 1949, make and enter an award under the Compensation Law of the State of California wherein the

said Industrial Accident Commission of California awarded Norma Buie the sum of Six Thousand Dollars (\$6,000), together with the sum of Three Hundred Dollars (\$300), as the funeral expense.

## X.

That the said Maryland Casualty Company under its policy has become obligated and liable to pay and has in part paid the sum of Six Thousand Three Hundred Dollars (\$6,300) as aforesaid.

## XI.

That the recital of California statutes set forth in "Appendix A," appended hereto and by this reference made a part hereof, are correct transcriptions of valid and effective statutory laws of the State of California which were in full force and effect during all of the times herein mentioned.

## XII.

On June 14, 1950, forthwith after the commencement of this civil action, the plaintiff served written notice by registered mail on Norma Buie, widow of James Buie, of this action and of the name of the court in which this action is brought, and proof of such service has been filed in this action. The said Norma Buie has not replied to said notice or made any response thereto known to the plaintiff.

### Questions of Law to Be Decided by the Court

#### I.

Does the substantive statutory and decisional law of California or of Oregon govern the existence,

nature and incidents of the present action between these parties?

## II.

Does Sec. 8-903, O.C.L.A., being one of the Statutes of Limitation of Oregon, apply to and bar the maintenance of the present action?

## III.

Does Sec. 1-204, O.C.L.A., being one of the Oregon Statutes of Limitation, apply to and permit the maintenance of the present action?

## IV.

Do either Sec. 340 of the California Code of Civil Procedure or Sec. 338 of the California Code of Civil Procedure, bring Statutes of Limitation of California recited in said "appendix A" hereto, apply to and govern the maintenance of the present action?

Based upon said pre-trial hearing,

It Is Hereby Ordered, Considered and Adjudged, that this pre-trial order shall govern the proceedings in connection with the defendants' motion for dismissal and for summary judgment. In the event that defendants' motions are overruled a further pre-trial conference will be held to formulate the issue as to the negligence or culpability of the defendants.

Dated this 26th day of March, 1951.

/s/ GUS J. SOLOMON,  
U. S. District Judge.

Approved:

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Plaintiff.

/s/ L. A. RECKEN,  
Of Attorneys for Defendant.

### Appendix "A"

#### I.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of said State and duly approved by the Governor thereof:

Section 111 of the Labor Code of the State of California provided in part, prior to September 19, 1947, as follows, to wit:

"The Division of Industrial Accidents shall be under the control of and governed by the Industrial Accident Commission consisting of 7 members."

Said Section 111, from and after September 19, 1947, provided in part as follows, to wit:

"The Industrial Accident Commission, consisting of seven members shall exercise all judicial powers, including those vested in it under Sections 4903, 5301, and 5307 of this code."

Section 114 of the Labor Code of the State of California provided as follows, to wit:

"The commission shall be composed of two

panels of three members each. The members shall be assigned to the panels by the chairman and may be transferred from one panel to another by the chairman to facilitate the work of the commission. The chairman may act in the place of any member of a panel who is absent, or whose office has become vacant.

\* \* \*

“Except as otherwise expressly provided, each of the panels shall have the power to hear and determine matters within the jurisdiction of the commission. The commission shall by rule provide for a geographical division of the State to determine what matters are to be heard and decided by each panel. Particular matters may be transferred from one panel to another, or to the commission as a whole, by an order signed by four members of the commission. In any case in which the commission acts as a whole, the act of four members shall be considered the act of the commission.”

Section 133 of the Labor Code of the State of California provided as follows, to wit:

“The commission shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.”

Section 3204 of the Labor Code of the State of California provided as follows, to wit:

“Unless the context otherwise requires, the definitions hereinafter set forth in this chapter

shall govern the construction and meaning of the terms and phrases used in this division."

Section 3211 of the Labor Code of the State of California, being part of same Chapter and division as aforesaid Section 3204, provided as follows, to wit:

"‘Insurer’ includes the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or inter-insurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued."

Section 3501 of the Labor Code of the State of California provided in part as follows, to wit:

"The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury."

Section 3600 of the Labor Code of the State of California provided as follows, to wit:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of

and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

“(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

“(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

“(c) Where the injury is proximately caused by the employment, either with or without negligence.

“(d) Where the injury is not caused by the intoxication of the injured employee.

“(e) Where the injury is not intentionally self-inflicted.”

Section 3700 of the Labor Code of the State of California provided in part as follows, to wit:

“Every employer except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

“(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this State.”

Section 4701 of the Labor Code of the State of California provided as follows, to wit:

“Where an injury causes death, either with

or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for:

“(a) Reasonable expenses of the employee’s burial, not exceeding three hundred dollars (\$300).

“(b) A death benefit, to be allowed to the dependents when the employee leaves any person dependent upon him for support.”

Section 4702 of the Labor Code of the State of California provided in part as follows, to wit:

“The death benefit shall be a sum sufficient to equal:

“(a) In a case of total dependency, four times the average annual earnings of the deceased employee.

\* \* \*

“The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month unless the commission otherwise orders. Except as provided in the next paragraph the death benefit, when added to all accrued disability indemnity, shall not exceed four times the average annual earnings of the employee, nor exceed the sum of six thousand dollars (\$6,000) except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars (\$7,500) and except as otherwise provided in Sections 4553 and 4554. For a total

dependency the minimum death benefit shall be three thousand dollars (\$3,000).”

Section 4703 of the Labor Code of the State of California provided in part as follows, to wit:

“Subject to the provisions of section 4704, this section shall determine the right to a death benefit.

“If there is any person wholly dependent for support upon a deceased employee, such person shall receive the entire death benefit, and any person partially dependent shall receive no part thereof.”

Section 4903 of the Labor Code of the State of California provided in part as follows, to wit:

“The commission may determine, and allow as a lien against any amount to be paid as compensation:

“(a) Attorney’s Fee and Disbursements. A reasonable attorney’s fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith.

\* \* \*

“(d) Burial Expenses. The reasonable burial expenses of the deceased employee, not to exceed the amount provided for by Section 4701.”

Section 4905 of the Labor Code of the State of California provided as follows, to wit:

“Where it appears in any proceeding pend-

ing before the commission that a lien should be allowed if it had been duly requested by the party entitled thereto, the commission may, without any request for such lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award."

Section 5300 of the Labor Code of the State of California provided as follows, to wit:

"All the following proceedings shall be instituted before the commission and not elsewhere, except as otherwise provided in Divisions IV and V.

"(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

"(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

"(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

"(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any

benefit under the compensation provisions of this division.

"(e) For obtaining any order which by Divisions IV and V the commission is authorized to make.

"(f) For the determination of any other matter, jurisdiction over which is vested by Divisions IV and V in the commission."

Section 5301 of the Labor Code of the State of California provided as follows, to wit:

"The commission is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in section 5300 subject only to the review by the courts as specified in this division. Such jurisdiction may be exercised by the commission through either of its panels as described in Section 115 or, subject to the approval by the panel of the order, decision, or award, through a commissioner or referee."

Section 5302 of the Labor Code of the State of California provided as follows, to wit:

"All orders, rules, findings, decisions, and awards of the commission shall be *prima facie* lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division."

Section 5303 of the Labor Code of the State of California provided as follows, to wit:

"There is but one cause of action for each injury\* coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion of the commission, be joined in the same proceeding at any time."

Section 5307.5 of the Labor Code of the State of California provided in part as follows, to wit:

"The commission or a panel, a commissioner, or a referee may: \* \* \* Provide for the joinder in the same proceeding of all persons interested therein; whether as employer, insurer, employee, dependent, creditor, or otherwise."

Section 5800 of the Labor Code of the State of California provided as follows, to wit:

"After final hearing by the commission, it shall, within thirty days, make and file:

"(a) Its findings upon all facts involved in the controversy.

"(b) Its order, decision, or award stating its determination as to the rights of the parties. All awards of the commission either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil action on all due and unpaid payments from the date of the

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\*Laws 1947, Ch. 1034, effective September 19, 1947. (Prior to September 19, 1947, "injury" read "transaction.")

making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable."

Section 5801 of the Labor Code of the State of California provided as follows, to wit:

"The commission in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order payment thereof during the continuance of disability."

Section 3753 of the Labor Code of the State of California provided as follows, to wit:

"The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation."

## II.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, all being Part 1 of Division IV of the Labor Code of California, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 3204, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California, provided as follows, to wit:

“Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division.”

Section 3209, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California, provided as follows, to wit:

“‘Damages’ means the recovery allowed in an action at law as contrasted with compensation.”

Section 3210, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“‘Person’ includes an individual, firm, voluntary association, or a public, quasi public, or private corporation.”

Section 3850, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“As used in this chapter:

“(a) ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.

“(b) ‘Employer’ includes insurer as defined in this division.”

Section 3851, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“The death of the employee or of any other person, does not abate any right of action established by this chapter.”

Section 3852, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.”

Section 3853, Chapter 5, Part 1, Division IV, of

the Labor Code of the State of California provided as follows, to wit:

“If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently.”

Section 3854, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided in part as follows, to wit:

“If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, \* \* \* the employer shall pay any excess to the injured employee or other person entitled thereto.”

Section 3855, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“If the employee joins in or prosecutes such

action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages."

Section 3855, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

"The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."

### III.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, all being in Part II, Title II, of the Code of Civil Procedure of California, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 312, Part II, Title II, Chapter 1, of the Code of Civil Procedure of the State of California provided as follows, to wit:

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have

accrued, unless where, in special cases, a different limitation is prescribed by statute."

Section 335, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided as follows, to wit:

"The periods proscribed for the commencement of actions other than for the recovery of real property, are as follows:"

Section 338, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided in part as follows, to wit:

"Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

Section 340, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided in part as follows, to wit:

"Within one year.

\* \* \*

"3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement;"

[Endorsed]: Filed March 26, 1951.

In the District Court of the United States  
for the District of Oregon

Civil No. 5419

MARYLAND CASUALTY COMPANY, a  
Corporation,

Plaintiff,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Defendants.

JUDGMENT ORDER

Defendants filed a Motion for Summary Judgment and a Motion to Dismiss; thereafter, a Pre-trial Order, in which the parties agreed to all of the facts necessary for a determination of such motions, was entered. The Court, on the basis of such agreed facts, finds that the defendants' motions should be allowed.

It Is Ordered and Adjudged that the action be and the same is hereby dismissed and that judgment in favor of the defendants be entered.

Dated this 29th day of March, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, defendants, and Messrs. L. A. Recken and Senn, Recken & Recken, defendants' attorneys:

Notice is hereby given that Maryland Casualty Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of March, 1951, dismissing the action of the plaintiff and entering judgment in favor of the defendants.

/s/ DENTON G. BURDICK, JR.,

/s/ LAMAR TOOZE, JR.,

CAKE, JAUREGUY & TOOZE,

Attorneys for Appellant.

[Endorsed]: Filed April 26, 1951.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents, that we Maryland Casualty Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a Maryland corporation, as surety, are held and firmly bound unto Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, defendants in the full and just sum of Two

Hundred Fifty and no/100 (\$250.00) Dollars to be paid to the said Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, their attorneys, executors or administrators; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of April, 1951:

Whereas, lately in the District Court of the United States for the District of Oregon in an action pending in said Court, between Maryland Casualty Company, a corporation, plaintiff, and Sidney F. Paton and Lois Eleanor Paton, defendants, doing business as Paramount Service, a judgment was rendered against the said plaintiff and the said plaintiff having filed in said Court a Notice of Appeal to reverse the judgment in said action on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California, or at such other proper place as the Court may see fit to hold said session.

Now, the condition of the above obligation is such, that if the said Maryland Casualty Company, a corporation, shall pay the costs if the appeal is dismissed or the said judgment affirmed, or such costs as the said Court of Appeals may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

[Seal]

MARYLAND CASUALTY  
COMPANY,

By /s/ [Indistinguishable],  
Attorney in Fact, Principal.

[Seal] UNITED STATES FIDELITY  
AND GUARANTY CO.,

By /s/ KARL H. DOERRE,  
Attorney in Fact, Surety.

Countersigned:

/s/ [Indistinguishable],  
Resident Agent.

[Endorsed]: Filed April 26, 1951.

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[Title of District Court and Cause.]

#### PLAINTIFF'S STATEMENT OF POINTS

The plaintiff-appellant intends to rely on the following mentioned points in its appeal from the judgment of the District Court dismissing its action:

1. The Court erred in holding that the plaintiff's complaint did not state a claim upon which relief could be granted.
2. Based upon the agreed facts contained in the pre-trial order, the Court erred in dismissing plaintiff's action.
3. Based upon the agreed facts contained in the pre-trial order, the Court erred in granting a summary judgment of dismissal.

4. Based upon the agreed facts contained in the pre-trial order, the Court erred in holding that plaintiff could not maintain a civil action based upon the laws of the State of California set forth in the pre-trial order.

5. Based upon the agreed facts contained in the pre-trial order, the Court erred in holding that Section 8-903, Oregon Compiled Laws Annotated, prevented the maintenance of this civil action by plaintiff.

6. Based upon the agreed facts contained in the pre-trial order, the Court should have overruled defendant's motion for summary judgment and motion to dismiss and should have allowed the action to proceed to issue and trial on the question of whether the defendants wrongfully caused the death of James Buie.

/s/ DENTON G. BURDICK, JR.,

/s/ LAMAR TOOZE, JR.,

CAKE, JAUREGUY & TOOZE,

Attorneys for Plaintiff-

Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

**STIPULATION AS TO DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL**

It Is Hereby Stipulated and Agreed between the parties to the above-entitled action that the following designated parts of the record, proceedings and evidence shall be included in the record on appeal:

1. Complaint.
2. Motion for Summary Judgment.
3. Motion to Dismiss.
4. Pre-Trial Order.
5. Judgment.
6. Notice of Appeal.
7. Bond on Appeal.
8. Plaintiff's Statement of Points.

Dated at Portland, Oregon, this 2nd day of May, 1951.

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Plaintiff.

/s/ L. A. RECKEN,  
Of Attorneys for Defendants.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

## DOCKET ENTRIES

1950

- May 3—Filed complaint.
- May 3—Issued summons to marshal.
- May 5—Filed summons with returns.
- May 24—Filed motion for issuance of summons for service on Secty of State and for order appointing person to make service.
- May 24—Filed brief in support of motion.
- May 25—Filed and entered order for issuance of summons for service on Secty of State, fixing time for appearance and designating B. R. Smith to make service. Fee.
- May 25—Mailed summons for service on Sec. of State to B. R. Smith, Salem, Ore.
- June 12—Filed affidavit and proof of service.
- June 12—Filed affidavit of mailing notice and summons.
- June 21—Filed motion of defts for extension of time.
- June 21—Filed stipulation for extension of time.
- June 21—Filed and entered order allowing defts until July 20 to plead. Fee.
- June 28—Filed affidavit of notice to surviving widow of employee.
- July 10—Filed defendants' motion for summary judgment.
- July 10—Filed defendants' motion to dismiss action.
- July 24—Record of hearing on defts' motion for

1950

summary judgment and motion for dismissal; argued and order entered to draw pre-trial order setting up legal questions. Fee.

Oct. 30—Record of pre-trial conference—briefs to be filed 10 days for pltf—10 days for deft and 10 days to reply. S.

Nov. 21—Filed defendants' brief.

Dec. 1—Filed plaintiff's answering brief on motion to dismiss and motion for summary judgment.

Dec. 11—Filed and entered order extending time to file brief. S.

Dec. 13—Filed defendants' reply brief.

1951

Mar. 26—Filed and entered pre-trial order. S.

Mar. 26—Record of oral opinion.

Mar. 29—Filed and entered judgment of dismissal. S.

Apr. 26—Filed notice of appeal by plntf.

Apr. 26—Filed bond on appeal.

Apr. 26—Copy notice of appeal to Senn and Recken.

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#### CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of

Complaint, Motion for summary judgment, Motion to dismiss, Pre-trial order, Judgment, Notice of appeal, bond on appeal, Statement of points, Designation of record on appeal, and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5419, in which the Maryland Casualty Company, a corporation, is Plaintiff and Appellant, and Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, are Defendants and Appellees; that the said record has been prepared by me in accordance with the designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of May, 1951.

[Seal] LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

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[Endorsed]: No. 12937. United States Court of Appeals for the Ninth Circuit. Maryland Casualty Company, a corporation, Appellant, vs. Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, Appellees. Transcript of Rec-

ord. Appeal from the United States District Court  
for the District of Oregon.

Filed May 17, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

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In the United States Court of Appeals for the  
Ninth Circuit

No. 12937

MARYLAND CASUALTY COMPANY, a Corpo-  
ration,

Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Appellees.

STIPULATION DESIGNATING PORTION OF  
RECORD TO BE PRINTED AND ADOP-  
TION BY APPELLANT OF STATEMENT  
OF POINTS FILED IN TRIAL COURT

It is hereby Stipulated and Agreed by and be-  
tween the appellant by Denton G. Burdick, Jr., one  
of its attorneys, and the appellees by L. A. Recken,  
one of their attorneys, that the entire record on

appeal in the above matter is designated to be printed.

It is further Stipulated and Agreed that the appellant on this appeal is relying upon the Statement of Points heretofore filed in this cause with the District Court of the United States for the District of Oregon which Statement of Points is hereby formally adopted by appellant as being the concise statement of the points upon which appellant intends to rely on this appeal.

Dated at Portland, Oregon, this 15th day of May, 1951.

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Appellant.

/s/ L. A. RECKEN,  
Of Attorneys for Appellee.

[Endorsed]: Filed May 18, 1951.



United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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MARYLAND CASUALTY COMPANY, a corporation,  
*Appellant,*  
vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,  
Doing Business as PARAMOUNT SERVICE,  
*Appellees.*

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**APPELLANT'S BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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SENN, RECKEN & RECKEN,  
L. A. RECKEN,  
Public Service Building,  
Portland, Oregon,  
*Attorneys for Appellees.*

CAKE, JAUREGUY & TOOZE,  
DWIGHT L. SCHWAB,  
DENTON G. BURDICK, JR.,  
LAMAR TOOZE, JR.,

Equitable Building,  
Portland, Oregon,  
*Attorneys for Appellant.*



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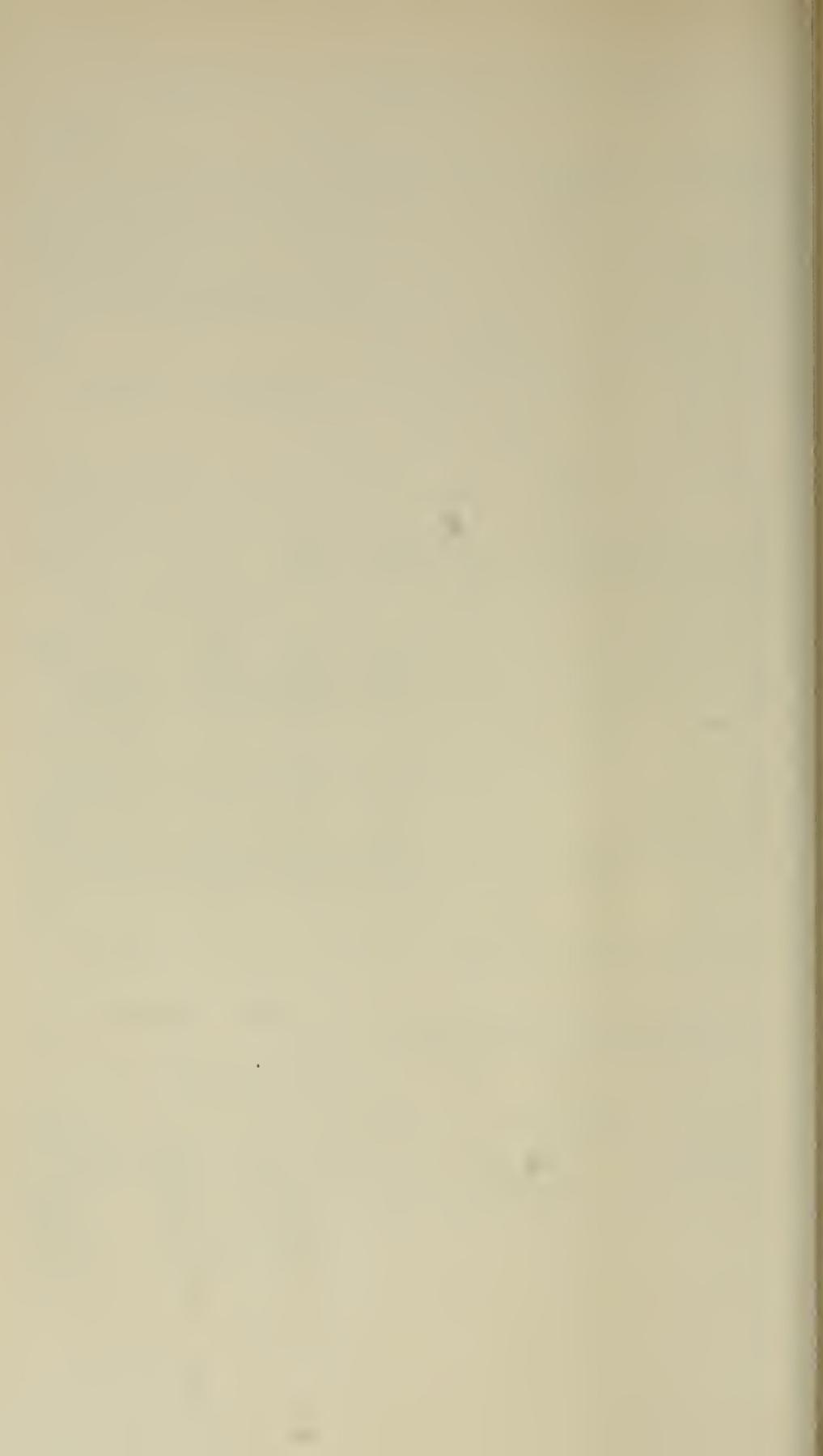
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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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MARYLAND CASUALTY COMPANY, a corporation,  
*Appellant,*  
vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,  
Doing Business as PARAMOUNT SERVICE,  
*Appellees.*

**APPELLANT'S BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**JURISDICTION OF THE DISTRICT COURT**

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Section 1332, this being a civil action in which the matter in controversy exceeds the sum of \$3,000, exclusive of interest and costs, and is between citizens of different states. The plaintiff is a citizen of Maryland (Paragraph I, Agreed Statement of Facts, Tr. 29) and the defendants are citizens of Cali-

fornia (Paragraph IV, Agreed Statement of Facts, Tr. 29) and the matter in controversy is \$6,300 (Paragraphs IX and X, Agreed Statement of Facts, Tr. 31, 32).

## **JURISDICTION OF THE COURT OF APPEALS**

The jurisdiction of the Court of Appeals to review the judgment of the District Court (Tr. 49) is based upon 28 U.S.C.A., Section 1291, said judgment being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sections 1252, 1253.

## **CONCISE STATEMENT OF THE CASE**

On October 2, 1947, James Buie was instantly killed in a collision between his automobile and a truck owned by the defendants and operated by their employee. This accident occurred in Oregon (Tr. 29, 30, 31).

James Buie was, at the time of his death, acting in the course of his employment by James T. Moore. This employment relation was contracted in the State of California, and was therefore within the provisions of the California Labor Code and Workmen's Compensation Act (Tr. 29, 30, 31).

After Buie's death, his widow, Norma Buie, applied to the California Industrial Accident Commission for death benefit compensation. She received an award of \$6300, which the appellant was ordered to pay pursuant to the terms of the Workmen's Compensation Liability

policy maintained with it by James Moore (Tr. 29, 30, 31).

This action was commenced on May 3, 1950, more than two years after the death of James Buie (Tr. 55). The object of this action is to recover from appellees the amount so awarded to Norma Buie. Appellant alleged in its complaint (Tr. 3-24) that the death of James Buie was attributable to the negligence of appellees' employee in the operation of their truck. This issue of negligence is assumed in appellant's favor for the purposes of this appeal.

On May 3, 1950, appellant filed its complaint in the U.S. District Court for the District of Oregon. This complaint alleged the facts just summarized. Thereafter, the appellees filed a motion to dismiss appellant's complaint (Tr. 26), and a motion for summary judgment (Tr. 24). These motions were based on two theories: (1) That appellant's only cause of action is one for the wrongful death of Buie under the Oregon Wrongful Death statute (Section 8-903, O.C.L.A.); and that such an action must be commenced within two years of the date of death (Section 8-903 O.C.L.A.), which appellant admittedly did not do; and (2) that appellant failed to state a claim upon which relief could be granted.

The District Court, upon argument of appellee's motion, declined to rule thereon before a pre-trial order was drafted. Therefore, the parties prepared a pre-trial order (Tr. 28 to 48) containing an "agreed statement of facts" (Tr. 29-32), and an Appendix (Tr. 34-48) containing statutory material deemed applicable to the case. This

pre-trial order reserved any consideration of the issue of negligence upon which appellee's liability will ultimately depend (Tr. 28, 33); but the pre-trial order admitted all of the other basic facts summarized above.

The District Court, after considering the text of the pre-trial order and briefs submitted by the parties, entered a final judgment order that the appellee's motions should be allowed and that appellant's action should be dismissed (Tr. 49). This appeal is taken from that final judgment order.

## **CONTENTIONS OF APPELLEES**

Appellees contend that under the Agreed Statement of Facts, the only possible action arising out of James Buie's death is one for wrongful death under the Oregon wrongful death statute (Sec. 8-903, O.C.L.A.), and that the statutory limitation contained in said Section 8-903, O.C.L.A., had expired before the plaintiff commenced this action. The provisions of said Sec. 8-903, O.C.L.A., were, at the time of Buie's death and at the time this action was commenced, as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

## **CONTENTIONS OF APPELLANT**

Appellant contends that the agreed statement of facts set forth a claim upon which relief can be granted and that such claim is not one for wrongful death nor barred by any statute of limitations. Appellant contends that it is entitled to recover in its own right, as an indemnity insurer which has been ordered to pay workmen's compensation for injuries resulting from defendant's negligence. Appellant asserts that this action should be sustained as one defined and created by the laws of California under which said compensation was paid (Labor Code, California, Sections 3852, 3853, 3854, et seq.; Tr. 45, 46); or as one in the nature of a common law proceeding for indemnity.

## **SPECIFICATION OF ERRORS**

(1) The Court erred in allowing Appellees' Motion for Summary Judgment based upon the admitted facts in the Pre-Trial Order.

(2) The Court erred in allowing Appellees' Motion to Dismiss based upon the admitted facts in the Pre-Trial Order.

## **ARGUMENT**

Shed of detail, the elementary facts and permissible assumptions to which the ensuing argument is directed are these: James Buie was killed in Oregon while em-

ployed under a California contract of employment to which the California Workmen's Compensation Act applied. The appellant, as the insurer of Buie's employer, was ordered by the California State Industrial Accident Commission to pay Buie's widow a death benefit.

The appellant now sues the appellees, declaring that the cause of Buie's death, and hence the origin of plaintiff's obligation to Buie's widow, was the negligent operation of defendant's truck by defendant's employee.

Two basic issues to be decided upon this appeal are whether the appellant acquired by virtue of the above facts an enforceable claim against appellees, and, if so, whether such claim has been barred by any statute of limitations.

These issues may be framed more specifically in terms derived partly from acquaintance with the proceedings and briefs in the District Court:

1. Appellees have stated that if Buie's death is imputable to the negligence of appellees' employee, then the only cause of action that can accrue is one for wrongful death; that this cause of action is governed solely by the *lex loci delicti*, in this case the Oregon wrongful death statute; that the Oregon wrongful death statute contains a two-year limitation, and the appellant is precluded from this action by the fact that more than two years elapsed between Buie's death and the commencement of this cause.

Appellee's position is, of course, that the law of California can confer no rights upon appellant which are enforceable in this action.

2. Appellant advances two theories, each of which identifies appellant's claim essentially as one

in the nature of restitution: a right to recover from appellees for the loss and liability which appellees' actively wrongful conduct imposed upon appellant.

One of these theories is based on the express language of the California Labor Code; the other is simply an application of the common law doctrine of indemnity.

Under either theory, the appropriate period of limitations had not expired before the commencement of this action. (See Appendix, p. 37)

Having stated the basic factors of the dispute, it is well to amplify somewhat the appellant's expression of its case. As will be seen, the common law furnished the appellant with a cause of action for "indemnity," which may be described as a quasi-contractual action for restitution of the sum the plaintiff paid as a result of an act for which the defendant was primarily responsible and for which the defendant should recompense the plaintiff. The mere statement of the doctrine indicates its equitable nature and its special utility to insurers. In addition to the common law action for "indemnity," appellant relies upon portions of the California Labor Code, which have an effect almost identical to the common law action for "indemnity," and which are invoked by facts which would support a common law action for indemnity.

Since both theories enable the insurer of an employer to proceed directly against a third person whose negligence has exposed the insurer to compensation liability, they are substantially identical in result and application. However, clarity demands that they be separately discussed in this brief.

## A. Appellant's Right to Recover Under the California Labor Code

### I. THE STATUTORY BASIS OF THE INSURER'S RIGHT.

*The California Labor Code provides expressly for a situation in which an employee is injured or killed by the fault of someone other than his employer. In that event, the employee (or his beneficiaries) may claim compensation from his employer (or the employer's insurer). The employer (or insurer) may sue the wrongdoer for reimbursement of the compensation liability.*

Where an employee subject to the California Workmen's Compensation Act is injured or killed by the negligence or fault of some person other than his employer, the employee or his beneficiaries may claim compensation from his employer. In such a case, California Labor Code, Sec. 3852 provides:

"The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

Section 3851 of the California Labor Code provides that "The death of the employee or of any other person does not abate any right of action established by this chapter."

At this juncture, the statutory definitions become very important. Section 3209 of the Labor Code states that "*Damages* means the recovery allowed in an action at law as contrasted with compensation." An "employee" includes "the person injured and any other person to whom a claim accrues by reason of the injury or death of the former" [Labor Code, Sec. 3850 (a)] and "'employer' includes insurer as defined in this division" [Labor Code, sec.. 3850 (b)].

Section 3852 may now be paraphrased in terms which are justified by the statutes, and which are more consonant with this case:

Any insurer of an employer who pays or becomes obligated to pay compensation may likewise bring an action against such third person. In this event, the insurer may recover in the same suit the following items: the total amount of compensation and all other damages for which the insurer was held liable.

Section 3854 of the Labor Code plainly denotes the scope of the employer's (or insurer's) action against the tortfeasor:

"If the action is prosecuted by the employer (insurer) alone, evidence of any amount which the employer (insurer) has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages . . . the employer shall pay any excess to the injured employee or other person entitled thereto." (Partial quotation, matter in parentheses supplied.)

## II. INTERPRETATION OF EMPLOYER'S STATUTORY ACTION; CALIFORNIA DECISIONS.

### 1. *The cause of action is not based on liability for personal injuries.*

The California courts have consistently held that the employer (or his insurer) is the possessor of a cause of action *separate and distinct* from the injured employee's cause of action against the tortfeasor. This cause of action is for property damage to the employer or the insurer, not for the injury to the employee.

This is exemplified in *Limited Mutual Compensation Insurance Co. vs. Billings*, 74 Cal. App. (2d) 881, 169 P. 2d 673. Here the insurance carrier for an employer sued to recover amounts paid as compensation and medical benefits to two injured employees, on the ground that their injuries resulted from the negligence of the defendants. The action was commenced more than one year but less than three years after the employees were injured. The period of limitations for negligent personal injury was one year; that for property damage and for a "liability created by statute" was three years.

It was held that the insurer could maintain the action. Describing the insurer's cause of action, and applying the statutes mentioned above, the court said:

"These provisions establish a right of action in favor of the employer and make the third party directly liable to the employer where such an action is brought."

\* \* \* \* \*

"The appellant contends that this new right of action, thus given to the employer by these sections,

is based entirely upon these statutes and that such an action is one 'upon a liability created by statute' and governed by subd. 1 of section 338, C.C.P., and, further, that it is an action based upon an injury to a property right, thus also coming within the provisions of subd. 3 of section 338, C.C.P. On the other hand, the respondents contend that these sections of the Labor Code, and their predecessors, impose no new liability upon the negligent third party, that the employer is merely subrogated to, or substituted in, the long established right of the employee to sue the third party, and that it follows that the employer or his insurance carrier, like the employee, is subject to the one year limitation imposed by subd. 3 of section 340, C.C.P.

"While some cases may involve a mere matter of subrogation without independent right, sections 3850, 3852 and 3854 give a new and specific right to the employer and his insurance carrier. That this right of action against a third party who may have caused the injury to the employee which, in turn, has caused an injury to the employer or his insurance carrier, who has been obligated by law to compensate the employee to a certain extent, is not only a statutory right which is based upon a statutory liability, but one entirely separate and distinct from the right of action long enjoyed by the employee, has been recognized in several decisions in this state." 169 P. 2d 673, 675, 676.

In *City of Los Angeles vs. Howard*, 80 Cal. App. (2d) 728, 182 P. 2d 278, an employer (the city) sued the estate of a tortfeasor for recovery of compensation and other benefits paid to the city's injured employee. On the theory that the employer's claim was a tort claim which would not survive the death of the tortfeasor, the latter's administratrix contested the liability. It was held, however, that the employer's claim was one for property damage, and could be asserted against the estate:

"[1] The sole question presented for determination herein is whether an employer may maintain an action against the estate of a deceased person to recover the money he has expended under the provisions of division 4 of the Labor Code because of injury to or death of his employee, proximately caused by the negligence of such person during his lifetime? Our answer to this query is in the affirmative.

"[2] The cause of action alleged in plaintiff's complaint differs from the injured employee's common law action for damages. The legislature, by the enactment of section 3852 of the Labor Code, created a new cause of action for the employer entirely separate and distinct from the right of action of the employee. *Limited Mutual Comp. In. Co. vs. Billings*, 74 Cal. App. 2d 881, 882, 169 P. 2d 673.

\* \* \* \* \*

"The payment by plaintiff of money for medical attention and compensation to its injured employee pursuant to the obligation imposed upon it by the provisions of the Labor Code caused a property injury to plaintiff within the meaning of section 574, Probate Code. *Morris v. Standard Oil Co.*, 200 Cal. 210, 214, 252 P. 605; *Hunt v. Authier*, supra, 28 Cal. 2d at page 296, 169 P. 2d 913. Plaintiff's complaint against the administratrix of the estate of the tortfeasor for recovery of the moneys so expended states a proper cause of action and the demurrer of defendant should have been overruled." 182 P. 2d 278, 279.

2. *The cause of action is not derived from the injured employee by subrogation to his rights, if any.*

The interpretations of the California Labor Code refute any argument that the employer or insurer is

merely subrogated to the injured employee's cause of action.

In *California Casualty Indemnity Exchange v. United States*, 74 F. Supp. 401, decided in the Southern District of California, District Judge Hall compared the position of an employer, suing a third party under the provisions of the Federal Longshoremen's and Harbor Workers' Act, with the position of an employer (or insurer) who seeks such relief under the California Labor Code:

"The right of recoupment on the ground of third party liability is not a right created in the libellants by statute as in the *California Compensation Act*. California Code Sec. 3852; *Morris v. Standard Oil*, 200 Cal. 210, 252 P. 605. The difference lies in the fact that the rights of the employer and its insurance carrier under the Longshoremen's Act result solely by an assignment of the original rights of the injured person, which original rights are not created by the Statute. The act of the injured person, or representatives of decedent in seeking and accepting compensation under the Longshoremen's Act, operates as an assignment of those rights and creates no new right of action in the employer as is done in the *California Law*. The assignee has and can have no greater right than the assignor. *Webster v. Clodfelter*, 76 U.S. App. D.C., 171, 130 F. 2d 434." (Italics in text supplied)

The cases previously discussed, *Limited Mutual Compensation Insurance Co. vs. Billings*, 74 Cal. App. 2d 881, 169 P. 2d 673, and *City of Los Angeles v. Howard*. 80 Cal. App. 2d 728, 182 P. 2d 278, of course, also directly state that the employer's or insurer's right of action against the third party tortfeasor is not obtained

merely by a subrogation or succession to the employee's cause of action, *but is a new distinct claim accrued from the damage to the employer or insurer.* This discrimination is of essential importance. If the Maryland Casualty Company merely succeeded to the rights of Buie's widow as a consequence of its duty to pay her death-benefit compensation, then it would be apparent that the Company would be, in substance, attempting to prosecute her wrongful death cause of action which was created by Oregon Law, since the accident occurred in Oregon. The obvious procedural straits that would attend such an action (since the Company is not eligible to enforce such a claim directly) would have been averted by the expiration of the two-year statute of limitations. Indeed, appellees have mainly propounded and relied upon this very hypothesis, that appellant's only remedy is based upon the Oregon wrongful death statute.

Instead of enforcing a claim for wrongful death, on the theory that it had been transferred to the Company by some process of subrogation, the true nature of the Company's case stamps it as *an original cause of action for property damage.*

It may be acknowledged that the insurer's cause of action is ultimately founded in the tortious wrongdoing of the third-party defendant. But the insurer's action is not for the immediate consequences of that wrongdoing—it is not for the wrongful death—it is for the damage and loss that resulted to the insurer because of the wrongful death. From another perspective, it is almost identical with the principle of indemnity: the plaintiff

has discharged a liability which the defendant ought to pay and which arose from the defendant's active wrongdoing.

The plaintiff having acquired a new, original and distinct cause of action, which the California law characterizes as one based on property damage, then the statute of limitation governing such actions should apply. Moreover, the Oregon limitation must be consulted, since a limitation is a procedural matter governed by the law of the forum. As a comparison of the pertinent statutes of limitation will prove (Appendix, pp. 37, 39) Section 1-204 (2), (4), O.C.L.A., is identical with sec. 338 (1), (3), Code of Civil Procedure of California, which was held applicable in the case of *Limited Mutual Ins. Co. vs. Billings*, supra. The period of limitations being six years in Oregon, this action was timely brought.

### III. ENFORCEABILITY OF CALIFORNIA STATUTORY CAUSE OF ACTION IN OREGON—THE CONFLICT OF LAWS QUESTION.

One of the contentions that can be made by appellees is that since Buie died in Oregon, the law of Oregon applies exclusively and appellant therefore cannot rely on the statutory action given it by the California Labor Code. Possibly such a contention would have been a formidable one at an earlier date, prior to the formulation of the conflict of laws principles relating to workmen's compensation.

Under classical general conflict of laws principles developed in other fields, it might be said that since Buie

was killed in Oregon, the Oregon law would govern the nature and incidents of any liability arising out of his death. However, under the body of conflict rules which has developed since the workmen's compensation acts have been adopted and which pertain peculiarly to this field of labor law, it is clear that appellant could be, and was, required to pay compensation under the law of California for a death which occurred in Oregon (See Restatement of the Law of Conflict of Laws, Section 398). If the California law had no application here, this action would never have arisen because appellant would not have been subjected to liability for the award to Buie's widow made under California law.

In *Sloan v. Appalachian Electric Power Co.*, 27 F. Supp. 108, a diversity case arising in the Courts of West Virginia, it appeared that Sloan, who was covered by the Workmen's Compensation Act of Kentucky, was injured in West Virginia and brought a personal injury action in West Virginia against the third party who caused his injury. The insurance carrier against whom an award was made under the Kentucky Workmen's Compensation Act sought to intervene on the ground that the carrier was given such right under the Kentucky statute. Sloan resisted the intervention on the ground that the accident occurred in West Virginia and therefore West Virginia law applied and no rights could be asserted under the law of another state. In disposing of this contention the Court said:

"Plaintiff says that since the accident happened in West Virginia the West Virginia law should govern this question of intervention, and that in West

Virginia an employer has no right of subrogation against a third person who negligently injures an employe for which injury the employe receives compensation. I cannot agree that the West Virginia law controls this question.

"It is true that the law of West Virginia, where the accident occurred, determines the question of negligence, but the law of Kentucky determines the rights of the parties under plaintiff's contract of employment. The contract of employment was entered into in Kentucky, and the provisions of the Kentucky Compensation Act became a part of that contract of employment, so that the insurance company's right of subrogation is not only statutory but contractual.

"Plaintiff himself has recognized the applicability of the Kentucky Compensation Act by making claim and receiving compensation thereunder. The rights of the parties to that contract of employment must be enforced in accordance with the Kentucky law, irrespective of the place where the accident occurred or the place where the suit is instituted. The motion to intervene is granted." 27 F. Supp. 108, 109.

In the case of *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 30 NE (2d) 14 (1940), Biddy was killed in Illinois and his administratrix brought suit in Illinois to recover for his wrongful death. It appeared that Biddy was subject to the Michigan Workmen's Compensation Act and the defendant pleaded an award made thereunder which had the effect under Michigan law of giving the cause of action arising out of Biddy's death to his employer, who was therefore the proper party plaintiff. In sustaining this defense, the Court makes it clear that the foreign law does apply and gives the constitutional basis for so holding as follows:

"Section 1 of article 4 of the Federal constitution declares that full faith and credit shall be given in each State to the public acts of every other State and it is settled that a statute is a public act within the meaning of that clause. (Citing cases.) It is equally well established that full faith and credit applies only to those acts which are within the legislative jurisdiction of the State enacting them. (Citing cases.) It does not follow, however, that a State is without power to enact legislation providing for compensation to local employees employed under a contract made locally for injuries occurring beyond the boundaries of the State. Beall Bros. Supply Co. v. Industrial Comm., 341 Ill. 193, 173 N.E. 64; Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 S. Ct. 571, 575, 76 L. Ed. 1026, 82 A.L.R. 696. In the Clapper case, the court, in considering the extra-territorial effect to be given the Workmen's Compensation Act of one State by the courts of another under the full faith and credit clause, said: 'The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extra-territorial application of the law of the state creating the obligation \* \* \*.' " 30 N.E. 2d 14, 17, 18.

The preceding specialized argument should not be construed as an admission that this case necessarily presents any unusual conflict of laws questions. There is no reason to be discerned in logic, principle or policy why this California cause of action should not be enforceable in Oregon, just as any other California cause of action should be enforced where process may be obtained against the defendant.

The fact that Oregon has a wrongful death statute which pertains to the incident from which this action

indirectly arose should not be deemed as an ouster of appellant from an Oregon court in which it seeks to prosecute a perfectly valid claim granted by the law of California.

To say that the Oregon wrongful death statute occupies the whole field of law and remedy, and nullifies the creation in California of a cause of action for property damage, is certainly a more startling proposition than the suggestion that appellant here is entitled to proceed on a case, coming from California, in which it can allege and prove appellees' wrong and the appellant's consequent damage. The only unusual feature of this claim, from a conflict of laws standpoint, is that California law should operate upon the Oregon injury; not that appellant should appear in Oregon for redress.

## B. Appellant's Common Law Right of Indemnity

As appellant stated at the outset of this brief, there are two grounds for its recovery in this action. The first ground, already discussed, is founded on the provisions of the California Labor Code.

The second ground for recovery is supplied by the common law doctrine of indemnity. This doctrine is of such manifest significance to this case, and is so well adapted to the solution of the peculiar problems presented herein, that it may well be determined to be the most effective line of approach.

Simply stated, the doctrine of indemnity holds that where one person, without actual fault, is subjected to

liability for the actual wrong of another, the latter must indemnify (i.e. recompense) the former. This doctrine may have originated as a simple case of subrogation, the earlier cases apparently being ones where a shipper's insurer was allowed to enforce the shipper's right against the carrier, after paying the shipper for losses sustained because of the carrier's negligence. *Liverpool and G. W. Steam Co. vs. Phenix Ins. Co.*, 129 U.S. 397, 32 L. Ed. 788, 9 S. Ct. 469 (1889).

Today, however, the principle of indemnity has evolved into an equitable system which operates without reference to "subrogation." The right to indemnity is a right distinct from that of the immediately injured person. As proof of this fact, and as vindication of appellant's right to recover, the evolution of the doctrine, as applied to cases like this, must now be described.

A proper introduction to the subject is supplied by *Travelers' Insurance Co. vs. Great Lakes Engineering Works Co.*, (6th C.C.A., 1911) 184 Fed. 426, which was decided during the era in which labor compensation and employer's liability statutes, and insurance therefor, became prominent.

In this case, the defendant Engineering Co. installed a defective steam engine in the plant of the Herancourt Brewing Co. The engine blew out its cylinder head, which struck two employees, Leinhart and Wund, killing Leinhart and injuring Wund. The Herancourt Co., although free of any active culpability in the accident, was nevertheless legally liable for the injury and death of its employees. The plaintiff Travelers Insurance Company insured the Brewing Co. against such employer's liabil-

ity, the policy containing a provision that the Travelers Company should be "subrogated, in case of payment of loss" under the policy, to the Brewing Company's right to recover such losses from persons responsible therefor. The Travelers Company sued the Engineering Company for the amounts paid to Wund, the injured workman, and to the administratrix of the estate of Leinhart, the deceased workman, and also the Court costs and legal expenses incurred in the litigation and settlement of the claims.

The defendant demurred to the complaint on grounds (identical with those advanced here) that the only action that could be maintained for damages resulting from the death of Leinhart was an action for wrongful death; that such an action could be maintained only by Leinhart's administratrix, hence the plaintiff lacked standing to maintain the action. This was rejected by the Circuit Court of Appeals, which said:

"We are . . . brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee.

"The rule is well settled, in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss; this right of the insurer against such other person not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract

of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only." 184 Fed. 426, 429, 430.

\* \* \* \* \*

"But it is insisted by defendant that the brewing company could have no right of action against the engineering company for causing the death of Leinhart, for the reason that there is no common law right of action for causing the death of a human being, the right of action being purely statutory—in Ohio the action being required to be brought in the name of the personal representative of the deceased, and for the exclusive benefit of the wife, husband, children, parents, or next of kin of the deceased (Rev. St. Ohio 1908, secs. 6134, 6135) . . . and that the injury to the insurance company from the death of Leinhart is thus too indirect and remote to give a right of action to the insurance company." 184 Fed. 426, 430.

The Court refuted these contentions. First, the Court adverted to the contractual relation between the engineering company (defendant) and the brewing company, and stated that "The brewing company . . . had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate."

"With respect to injuries not causing death, as in the case of Wund, we apprehend this proposition would not be questioned. With respect to the damage resulting from Leinhart's death, *the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his.* The ground of the recovery sought is that the engi-

neering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss. It can make no difference with its right of action over that the original recovery against it belonged to one person rather than another; to the widow and children rather than to the representative of Leinhart's estate. Under the allegations of the petition, the negligence of the engineering company was the direct and sole cause of Leinhart's death, and thus of the damages suffered by the brewing company. The injury to the insurance company was thus not indirect or remote but was direct and immediate, because it stands in the shoes of the brewing company. We know of no reason, either upon principle or authority, why the doctrine of subrogation, which has been expressly held applicable to indemnity by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity." (Italics supplied) 184 Fed. 426, 431, 432.

Before following the evolution of the doctrine of indemnity, in which this case performed a major function, several observations are valuable:

First, this case several times used the term "subrogation" to describe the insurer's status. It is very important to notice that the only "subrogation" present here was of the insurer to the employer's cause of action; and the Court expressly rejected the argument that the employer or insurer could only succeed to the employee's cause of action.

Second, this case emphatically and unequivocally stated that where an employer suffers liability on account of the injury of a workman by a third party, the

employer obtains a *new cause of action*. It must be conceded that there were contractual relations between the brewing company and the engineering company which enabled the Court to more easily detect a special duty, flowing to the brewing company from the engineering company, not to impose such damage upon the brewing company. But, as later cases will show, the basic principle has been extended so as to impose liability against strangers.

Third, this case clearly states that a cause of action may accrue to an employer on account of his legal liability for wrongful death; and that the existence of a cause of action for wrongful death or recovery by or for the workman is *not* exclusive of the employer's independent cause of action.

The case of *Staples, et al. vs. Central Surety and Ins. Corporation, et al.* (10th C.C.A., 1922), 62 F. 2d 650, illustrates the extent to which the law of indemnity has been expanded since the *Great Lakes Engineering Works* case.

The Sunray Oil Co. contracted with the Staples Drilling Co. for the latter to drill two oil wells on a certain leasehold. Sunray agreed to furnish the rig and derrick, and the Staples Company agreed to supply the necessary tools, equipment and personnel. While Staples was drilling one of the wells, a fire occurred which ruined the derrick. The Sunray Co. thereupon contracted with a person named Bush to build a new derrick. It is apparent there was no special relation between Bush and the Staples Company. Bush carried a policy of work-

men's compensation insurance with the plaintiff Central Surety and Insurance Corporation.

While Bush and his employees were working on the construction of the new derrick, the Staples Drilling Company was engaged in drilling operations nearby. A boiler, operated by the Staples Company, exploded, injuring one Goubler, an employee of Bush. Goubler obtained an award of compensation from the Oklahoma Industrial Commission, which was paid by plaintiff insurance company.

The insurance company then sued the members of the Staples Drilling Company for the amount paid as compensation, and for the legal expenses incurred in connection with Goubler's claim for compensation. The theory upon which plaintiff prevailed was this: that the Staples Company by their negligence imposed liability on Bush, as the employer of Goubler, under the Oklahoma Workmen's Compensation Law; that Bush therefore had a right of action for indemnity as against the Staples Company, and that plaintiff, as Bush's insurer was subrogated to that right. It is essential to observe that the only subrogation was of the insurer to the employer; not of either of them to Goubler's right, if any, against Staples.

The Court said:

"It is a well-recognized rule, supported by a great weight of authority, that, where one has been subjected to liability, and has suffered loss thereby, on account of the negligence or wrongful act of another, the one has a right of action against the other for indemnity." (Numerous citations with some brief analyses of earlier cases.)

"Upon this settled principle, it is clear that Bush, having been subjected to liability to his employee, Gouglar, under the Compensation Law, as a result of the negligence of appellants, had a cause of action, *in his own right*, for indemnity against appellants, at common law entirely independent of any provisions of the Compensation Law (Comp. St. 1921, Okl. sec. 7282 et seq. as amended). And the appellee, having discharged Bush's liability to Gouglar, pursuant to its contract of insurance, is subrogated to Bush's right against appellants." (Emphasis added)

\* \* \* \* \*

"Appellants do not directly deny the existence of this principle of law, nor challenge the controlling effect of the authorities cited. They seek to evade its applicability by two arguments. One is that, under the Oklahoma Compensation Law, as construed by its courts, Gouglar's common-law right of action is abolished. This misapprehends entirely the nature of the ground of recovery now under consideration. The appellee does not sue for the unliquidated damages suffered by Gouglar; it sues only for the amount it was required to pay out by reason of the negligence of appellants. Precisely the same argument was made in the Great Lakes Engineering W. Co. Case, *supra*, and was answered by the Sixth Circuit Court of Appeals in these words: 'With respect to the damage resulting from Leinhart's death, the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his.' And in the George A. Fuller Company Case (*George A. Fuller Co. vs. Otis Elevator Co.*, 245 U.S. 489, 28 S. Ct. 180, 62 L. Ed. 422), *supra*, it was held that the employer had a cause of action against the Otis Elevator Company, notwithstanding that it had been adjudicated that the injured servant had no cause of action against the Otis Company.

\* \* \* \* \*

"We conclude that the judgment below is right. *The negligence of appellants directly resulted in a financial loss to appellee; under elementary principles of the law of torts, recovery may be had therefore.* It is not necessary to determine whether the judgment may also be sustained on the second ground asserted, in subrogation to the rights of Gouger; we need not, therefore, inquire whether Gouger had any right to pursue his remedy against appellants or whether such right had been abrogated by the Compensation Law of Oklahoma. *The Compensation Law of Oklahoma has nothing to do with the case, except as it fixed a liability upon Bush for the negligence of appellants.* If an automobile belonging to Bush had been destroyed by the exploding boiler, he or his insurance carrier could have recovered, and there is nothing in the Compensation Law to the contrary. Where the injury is to Bush's servant, the Compensation Law required Bush to pay; but the financial loss to Bush or his insurance carrier is just as directly the result of appellant's negligence as if its force had been spent upon his automobile instead of his servant. For the same reason, the ownership of the oil and gas lease in question, and the status of Bush and appellants as independent contractors or otherwise become immaterial." 62 F. 2d 650, 653, 653. (Italics supplied)

The force and pertinence of this opinion as a guide to the proper appraisal of the instant case need not be labored. However, some factors of the Staples case are of special significance here.

1. It was held immaterial what the relationship was between the tortfeasor and the employer of the injured employee. In the *Great Lakes Engineering Case*, supra, there was a contractual tie between the employer and the tortfeasor, and the court commented upon that as an

element to be considered in deciding whether the tortfeasor should respond in damages to the employer's insurer.

However, the Staples case placed liability squarely upon the basis that the negligence of the third person had caused liability of the employer to his workman, for which the employer (or his insurer) had a cause of action; and this result would not depend upon any special relationship between the employer and the tortfeasor.

2. The right to indemnity was held to be independent of the injured employee's right of action against the tortfeasor. That is, the injury for which the employer sued was not something that occurred to the employee, or which was transferred from employee to employer, but rather an injury directly to the employer by virtue of his liability for workmen's compensation. *The only subrogation involved was that of the insurer to the employer's cause of action for indemnity.*

3. The right to indemnity was held to be independent of the workmen's compensation statute, except as the statute exposed the employer to liability to his workmen.

The next case is the only one discovered, during careful research, in which the facts are almost the same as ours. This case was decided on December 4, 1950, and was not, therefore, even available at the time the present case was considered by the District Court below. It is *Travelers Insurance Company v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (U.S. District Ct., W.D. Wisc.). Especial attention is invited to the interstate aspects of

this case. In March, 1950, one Oliver was killed in Minnesota by the crash of one of defendant's aircraft in which he was a passenger. At the time of his death Oliver was on a business trip for his employer, the J. C. Penney Co. Oliver's employment was subject to the Workmen's Compensation Act of Wisconsin, and the Wisconsin Industrial Accident Commission awarded Oliver's widow a total death and burial benefit of \$9600, which it ordered J. C. Penney and its insurer, plaintiff, to pay. The policy contained the usual clause subrogating the plaintiff Travelers Insurance Company to the rights of the J. C. Penney Company to recover against any other person or corporation.

Plaintiff alleged the facts just recited, in somewhat greater detail, the complaint concluding with a claim for "indemnity from the defendant" for the sum of \$9600. The defendant moved to dismiss the complaint for two reasons:

- (1) That the complaint failed to state a claim against the defendant upon which relief could be granted; and
- (2) For failure to join as parties the widow and children of Oliver.

An extended quotation of the opinion seems warranted by the fact that this case considered basic issues almost identical with those present in our controversy.

"On a motion to dismiss the complaint its allegations are admitted to be true, for the purpose of the motion, and the complaint should be construed in a light most favorable to the plaintiff.

"Plaintiff bases its claim against defendant, as set out in the complaint, solely on an implied contract

of indemnity, conceding that its claim does not arise under the Minnesota wrongful death statute, M.S.A. §573.02, or the Wisconsin Workmen's Compensation Act. St. 1949, §102.01 et seq. It claims indemnity from defendant for the compensation liability that it has discharged, which was imposed on it by defendant's negligence, which caused Oliver's death. (Italics added)

"Section 102.29(1) of the Wisconsin Compensation Act provides that the employer or insurer shall have the right to make claim or maintain an action in tort against a third party whose negligence results in injury or death of the employee.

"[2] This is not an action in tort, and is independent of any right of Oliver's widow and children to recover damages against the defendant. They have no interest in or connection with plaintiff's claim for indemnity, and are neither necessary or proper parties to this action.

"[3] The Court finds that the complaint states a claim against the defendant in favor of the plaintiff for indemnity.

"[4] The rule that an implied contract of indemnity arises in favor of a person who, without any fault on his part, is compelled to pay damages on account of the negligence of a third person is clearly stated in 42 C.J.S., Indemnity, § 21, pp. 596-597: 'It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having right of action against the latter for indemnity, provided they are not joint tort-feasors in such sense as to prevent recovery, as discussed infra § 27. This right of indemnity is based on the principle that every one is responsible for his own negligence, and if another person has been compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer

they may be recovered from him. It exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.'

"In 27 American Jurisprudence, pp. 465-467, the following is found:

" 'It has been generally stated that a contract of indemnity need not be express, but that indemnity may be recovered if the evidence establishes an implied contract. And although a right of indemnity generally arises by contract, express or implied, it has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

\* \* \* \* \*

" 'Accordingly, it has been stated that a person who, without fault on his own part, has been compelled to pay damages occasioned by the primary negligence of another is entitled to indemnity from the latter, whether contractual relations exist between them or not.'

"In the case of Aetna Life Insurance Co. v. Moses, 287 U.S. 530, 53 S. Ct. 231, 233, 77 L. Ed. 477, 482, the court said: 'Notwithstanding the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensation should be secured by insurance, and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is a normal incident of indemnity insurance.' "

The principal value of this case is its illustration of the manner in which an application of the doctrine of

indemnity facilitates the solution of a problem in which stubborn questions of the conflict of laws might otherwise abound. In that case, as in ours, a death occurred in one state for which there was a workmen's compensation recovery in another. This workmen's compensation recovery was held to have inflicted a legal injury upon the employer to which the insurer succeeded. This route of action avoided the question of the ability of the insurer to enforce a cause of action bestowed by the Wisconsin Workmen's Compensation Act, and it also obviated an inquiry whether the insurer had any possible remedies based upon the Minnesota wrongful death statute.

Equating this case with ours, which is aided by their factual similarity, it is obvious that indemnity is a right of action *supplemental* to and distinct from a wrongful death claim; from which it seems logically to follow that the existence in Oregon of a wrongful death statute should not be deemed exclusive of appellant's right to indemnity. Surely this analysis is fortified by the indemnity cases discussed previously, and it seems to have been squarely held, in a conflict of laws situation, in the *Northwest Airlines* case.

The common theme and rationale of the cases discussed thus far is that an employer who is subjected to workmen's compensation liability because of an injury (or death) inflicted upon his employee by the active negligence of another, has himself directly suffered a remediable legal wrong. The exact character of this legal wrong is possibly an academic inquiry. Surely it would

make no difference in our case, should indemnity be applied, whether the plaintiff's right is founded upon a property damage or upon an implied contract in the nature of a right to restitution, for the limitations of Oregon pertaining to such actions were not expired when this action was commenced (See Appendix, pp. 37, 38).

Moreover, while it may be assumed that the right to indemnity arose in California at the time of the Workmen's Comp. award to Mrs. Buie, and hence had a California common law "origin," it cannot be doubted that such a cause of action is enforceable in Oregon.

Numerous cases have confirmed the availability of an action for indemnity, in a broad range of situations. A few of these cases may be of interest.

The Supreme Court of the United States has recognized the principle of indemnity in several cases. One of them is *George A. Fuller Co. vs. Otis Elevator Co.*, 245 U.S. 489, 62 L. Ed. 422, 38 S. Ct. 180, 1918, where a general contractor was sued by the employee of a subcontractor, who recovered damages for personal injuries suffered because of the negligence of a person for whom the Otis Elevator Company was primarily responsible. The general contractor sued the Otis Company "to recover indemnity"; and Justice Holmes said, tersely, "If the petitioner is right and the primary duty rested on the Elevator Company it may recover in the present suit, unless the former proceedings constitute a bar." 245 U.S. 489, 490, 491.

In *Washington Gaslight Co. vs. District of Columbia*, 161 U.S. 316, 40 L. Ed. 712, 16 S. Ct. 564, a pedestrian

was injured by a defective "gas box" which the defendant gas company maintained on the sidewalk of the plaintiff District. The pedestrian sued the District and recovered for her personal injuries. The District sued the gas company for indemnity. The Court upheld the action, in an opinion which indicates that even at the time of that decision (1896) the indemnity principle was regarded as a salutary and general principle.

In *Busch and Latta Paint Co. v. Woermann Const. Co.*, 310 Mo. 419, 276 S.W. 614, we find another suit for indemnity. The plaintiff employed the defendant to build a scaffold for the use of plaintiff's employees. The scaffold was negligently constructed, and collapsed, injuring the plaintiff's workmen. It was held that the plaintiff, who had paid the employees for their injuries, had a right of indemnity from the defendant.

The doctrine of implied indemnity has been recognized in Oregon, also. In *Astoria v. Astoria and Columbia River R. Co.*, 67 Or. 538, 136 P. 645, 1913, the Oregon Supreme Court decided a case the facts of which are substantially identical with those reported in the Washington Gaslight Case, supra. A pedestrian was injured, while walking on the city's streets, by a dangerous condition caused by the defendant railway. The city was adjudged liable to the pedestrian for \$5,000 damages. It was held that the city could recover this amount from the Railroad Company, for, while the city owed the pedestrian a duty of maintaining safe streets, and hence was liable for her injury, the efficient and primary cause of the accident (i.e., the active and actual wrongdoing) was the negligence of the railroad company.

## CONCLUSION

The following elements seem to be established by the authorities cited and discussed above:

1. The appellant acquired a cause of action against appellees, by virtue of the California Labor Code, which operated upon the death of James Buie and the order of the California Industrial Accident Commission. This cause of action is entirely distinct from that conferred upon Buie's successors for wrongful death.
2. This California cause of action is founded upon a property damage, and neither the Oregon nor California statutes of limitations, governing such an action, would bar this proceeding.
3. This California cause of action should be enforced in Oregon, both under the general principle that a cause of action may be sued upon whenever process may be obtained, and under conflicts of laws rules relating to Workmen's Compensation cases.
4. That appellant also has a cause of action for indemnity is proven by very strong Federal authorities which support such an action both by clear analogy and by direct decision on almost identical facts. These cases hold that an insurer in appellant's position has a direct common law cause of action against the active tortfeasor, which is independent of the claim of the injured employee; and that this cause of action is moreover independent of any statute.

Upon either main theory, appellant's complaint and the pretrial order state facts upon which relief may and should be granted.

Respectfully submitted,

CAKE, JAUREGUY & TOOZE,

DWIGHT L. SCHWAB,

DENTON G. BURDICK, JR. and

LAMAR TOOZE, JR.

## APPENDIX

### A.

#### Statutes of Limitation

##### I. OREGON.

1. Section 1-202, Oregon Compiled Laws Annotated, provides in part as follows, to-wit:

“ \* \* \* The periods prescribed in the preceding section for the commencement of actions, shall be as follows: \* \* \*”

2. Section 1-203, Oregon Compiled Laws Annotated, provides as follows, to-wit:

“*Within ten years: Action on judgment, decree or sealed instrument.* Within ten years:

“(1) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;

(2) An action upon a sealed instrument.”

3. Section 1-204, Oregon Compiled Laws Annotated, provides as follows, to-wit:

“Within six years:

“1. An action upon a contract or liability, express or implied, excepting those mentioned in section 1-203 and section 1-207, as amended;

“2. An action upon a liability created by statute, other than a penalty or forfeiture, excepting those mentioned in section 1-207, as amended;

“3. An action for waste or trespass upon real property;

"4. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof."

4. Section 1-205, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within three years:

"1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape.

"2. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, except where the statute imposing it prescribes a different limitation, and except those mentioned in section 1-207, as amended."

5. Section 1-206, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within two years. \* \* \*

"(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

"(2) An action upon a statute for a forfeiture or penalty to the state or county."

6. Section 1-207, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within one year:

"1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

"2. All actions for libel and slander shall be commenced within one year after the cause of action shall have accrued.

"3. All actions for overtime or premium pay and all actions for penalties or liquidated damages for failure to pay overtime or premium pay; provided, that in all cases where a cause of action has already accrued and as to which a statute of limitations has not already run upon the effective date of this act, action must be brought before April 1, 1948."

## II. CALIFORNIA.

1. Section 312, California Code of Civil Procedure, provides as follows:

"[Commencement of civil actions.]

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

2. Section 335, California Code of Civil Procedure, provides as follows, to-wit:

*"Periods of limitation prescribed.* The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: \* \* \*"

3. Section 338, California Code of Civil Procedure, provides, in part, as follows:

"[Within three years:] within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture.

"2. An action for trespass upon or injury to real property.

"3. An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property."

4. Section 339, California Code of Civil Procedure, provides, in part, as follows:

"[Within two years:] within two years:

"1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code;  
\* \* \* \*

## B.

### California Labor Code

1. Section 3204 of the Labor Code of the State of California provides as follows, to-wit:

"Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division."

2. Section 3209 of the Labor Code of the State of California provides as follows, to-wit:

"‘Damages’ means the recovery allowed in an action at law as contrasted with compensation.”

3. Section 3210 of the Labor Code of the State of California provides as follows, to-wit:

“‘Person’ includes an individual, firm, voluntary association, or a public, quasi public, or private corporation.”

4. Section 3850 of the Labor Code of the State of California provides as follows, to-wit:

“As used in this chapter:

“(a) ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.

“(b) ‘Employer’ includes insurer as defined in this division.”

5. Section 3851 of the Labor Code of the State of California provides as follows, to-wit:

“The death of the employee or of any other person, does not abate any right of action established by this chapter.”

6. Section 3852, of the Labor Code of the State of California provides as follows, to-wit:

“The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension,

or other emolument paid to the employee or to his dependents."

7. Section 3853 of the Labor Code of the State of California provides as follows, to-wit:

"If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action if brought independently."

8. Section 3854 of the Labor Code of the State of California, provides, in part, as follows, to-wit:

"If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, \* \* \* the employer shall pay any excess to the injured employee or other person entitled thereto."

9. Section 3855 of the Labor Code of the State of California provides as follows, to-wit:

"If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to

either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages."

10. Section 3857 of the Labor Code of the State of California provides as follows, to-wit:

"The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."



United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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MARYLAND CASUALTY COMPANY, a corporation,  
*Appellant,*

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,  
Doing Business as PARAMOUNT SERVICE,  
*Appellees.*

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**APPELLEES' BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**United States  
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MARYLAND CASUALTY COMPANY, a corporation,  
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*Appellees.*

**APPELLEES' BRIEF**

---

Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**JURISDICTION**

This is a civil action. Plaintiff is a corporation organized under the laws of the State of Maryland (Tr. 29). Defendants are citizens of the State of California (Tr. 29). The amount involved in this controversy is \$6,-

300.00 (Tr. 32). Jurisdiction of the United States District Court is based upon 28 U.S.C.A., Section 1332.

The Judgment Order was a final decision in the District Court, a review of which may not be had in the Supreme Court under 28 U.S.C.A., Section 1252-1253.

## SUMMARY OF ARGUMENT

The questions raised in the lower court and decided in favor of the appellees were:

- (1) Does the Complaint state a claim against the defendants upon which relief can be granted?
- (2) Was the action coming within the period provided by the Statute of Limitations?

It is well to note to begin with that Appellant disclaims any attempt to come under the Oregon Wrongful Death Statute (Sec. 8-903 Oregon Compiled Laws Annotated).

*"Action by personal representative for wrongful death: Limitations: Amount recoverable.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

Appellant disclaims any attempt to base its claim upon subrogation to a cause of action which accrued to James Buie or the widow of James Buie or the estate of James Buie. Appellant bases its claim on two possible cause of action. One of these they contend arises by virtue of the statutes of the State of California and the other arises by what they describe as a right of indemnity.

For purposes of this brief, Appellees will follow the argument of Appellant as set forth in its brief. The burden of sustaining its cause of action in view of the challenge by defendants in the lower court rests upon Appellant. Appellant must carry the burden of proving that the claim set forth in the Complaint is one upon which relief can be granted.

#### **A. Appellant's Contention That It Has a Right to Recover Under the California Labor Code.**

Appellees make no contention that the sections of the California Labor Code which are set forth in Appellant's brief would not apply if the accident with which we are concerned had occurred in California, but for reasons that will be set forth later, Appellees contend that the statutes in California can have no extraterritorial effect and do not create in Appellant a cause of action arising from an accident which occurred in the State of Oregon.

The Workmen's Compensation laws of about all of the states have provisions by which either the employer, his insurance company or a state fund, as the case may

be, may be reimbursed partially or in full for compensation payments made for injuries caused by the negligence of a third party. See Wright, "Subrogation Under Workmen's Compensation Acts" (1948) Sec. 1.

Hardly any two of the Workmen's Compensation Laws of the various states are alike and the provisions by which the employer, his insurance company or the state fund may be reimbursed from a third party wrong-doer are even more varied. Some provide that the payment of compensation has no effect on the employees cause of action and that the employee can still sue the third party; some use a subrogation or assignment arrangement; some provide for an election by the employee. To hold that a tort committed in Oregon is not only subject to the liability created by the laws of the State of Oregon, but also by liability created in any one of the other forty-seven states and in addition the territories of the United States, illustrates the extremes to which Appellant goes in an attempt to sustain its cause of action.

The foregoing likewise applies to the decision set forth by the appellant in which the California Court has interpreted the California Workmen's Compensation Law. If this accident had occurred in California, the provisions of the California Labor Code and the decisions of the California Courts in interpreting the California Labor Code would be binding on the parties in this accident.

We call the Court's attention to the case of *Personius vs. Asbury Transportation Company*, 152 Oregon 286,

53 P. (2d) 1065, (1936). In this case the plaintiff, while operating a motor stage, was injured when the motor stage collided with a truck operated by defendant. The accident occurred in Oregon, but plaintiff's contract of employment was made in Idaho. Under the provisions of the Idaho act, plaintiff was entitled to compensation because his contract of employment was entered into in Idaho. He made claim for his compensation and received an award. He then brought this action against the wrongdoer. The defendant attempted to plead by way of defense the fact that compensation was paid in Idaho and the cause of action thereby was assigned to the employer by virtue of the law of Idaho.

The Court uses the following language:

"The law of Idaho granting to the employer the right to maintain in his own name an action to recover for injuries inflicted on his employee by a third party, if such a construction can be given to the Idaho statute, is not controlling here. The supreme court of Idaho has not construed the word 'subrogation', appearing in that statute, as equivalent to, and meaning the same thing as, an absolute assignment. Nor has it held that an injured workman, after receiving compensation under the act, is precluded from maintaining an action of this nature.

"It may be conceded for the purposes of this opinion that the state of Idaho 'has the power to forbid its own courts to give any other form of relief for such injury' than prescribed by its workmen's compensation act: *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (79 L. Ed. 1044, 55 S. Ct. 518). The prohibition imposed on the Idaho courts has no extraterritorial effect on the courts of this state." 152 Ore. 286, 309, 53 P. (2d) 1065, 1075. (Italics ours.)

Appellant contends that the recent trend of decisions involving Workmen's Compensation laws is to give them extraterritorial effect. It feels that the California law was given extraterritorial effect by the mere award of compensation made to the widow of James Buie. It takes no great discernment to realize that the liability for compensation did not arise because the California act has extraterritorial effect, but merely because the contract of employment between James Buie and the Quaker Pacific Rubber Company was entered into in the State of California and the California Labor Code covers the relationship between employers and employees in all cases when the contract of employment is made in the State of California.

Deering's California Codes, Labor Code (1937):

"§ 5305. CONTROVERSIES ARISING OUT OF INJURIES SUFFERED OUTSIDE STATE: RIGHT TO COMPENSATION OR DEATH BENEFITS. The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependents shall be entitled to the compensation or death benefits provided by this division."

In the case of *Sloan vs. Appalachian Power Electric Company*, 27 F. Supp. 108, cited by Appellant on Page 16 of its brief, the act of Kentucky was not given extraterritorial effect, but rather, the court held that Sloan, by applying for and receiving compensation in Kentucky, entered into a contract concerning any right he

might have had against a third party wrongdoer. The court merely gives effect to that contract. The case does not hold that the insurance carrier has a cause of action in West Virginia, but merely holds that Sloan has contracted away some of his rights. As the court says on Page 109 (which is also cited on Page 17 of Appellant's Brief):

"It is true that the law of West Virginia, where the accident occurred, determines the question of negligence, but the law of Kentucky determines the rights of the parties under plaintiff's contract of employment. The contract of employment was entered into in Kentucky, and the provisions of the Kentucky Compensation Act became a part of that contract of employment, so that the insurance company's right of subrogation is not only statutory but contractual." 27 F. Supp. 108, 109.

The same applies to the case of *Biddy vs. Blue Bird Air Service*, 374 Ill. 506, 30 N.E. (2d) 14 (1940). In this case the court is not giving extraterritorial effect to the statute of another state to create a cause of action, but rather, it holds that the widow by contract divested herself of part of her cause of action and created in her deceased husband's employer part of the cause of action she has under the laws of the State of Illinois. The court in this case quotes from the case of *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. This is quoted by Appellant in its brief on Page 18 and is as follows:

" \* \* \* In the Clapper case, the court, in considering the extraterritorial effect to be given the Workmen's Compensation Act of one State by the courts of another under the full faith and credit

clause, said: 'The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extraterritorial application of the law of the state creating the obligation.' " 30 N.E. (2d) 14, 17-18, 374 Ill. 506, 512.

These cases and other similar cases do not give the Workmen's Compensation Act of one state extraterritorial effect in creating a new cause of action, but merely hold that a person who by contract makes himself subject to the Workmen's Compensation Act in one state cannot avoid the obligations by bringing an action in another state.

## **B. Appellant's Contention That It Has a Common Law Right of Indemnity.**

In addition to a cause of action which Appellant contends it has on the basis of the legislation of California and the decisions of the California courts, Appellant contends that it has a cause of action arising from the common law right of indemnity. Appellant relies heavily upon two cases. *Travelers' Insurance Co. vs. Great Lakes Engineering Works Co.*, (6th C.C.C., 1911) 184 Fed. 426, and *Staples, et al. vs. Central Surety and Ins. Corporation, et al.* (10th C.C.A., 1922) 62 F. 2d 650. In view of Appellant's heavy reliance upon these two cases, careful scrutiny of them should be made.

In the Great Lakes Engineering Works Co. case we have a situation entirely different from our present case and Appellant, in its brief notes this difference. The en-

gineering company did some boiler work for the brewing company which we can assume was defective. The boiler exploded, killing one employee of the brewing company and injuring another. Travelers' Insurance Company, the compensation carrier for the brewing company paid compensation and brought the action against the engineering company. The lower court sustained the Demur-  
rer of the defendant. The Circuit Court of Appeals held that the Complaint stated sufficient facts for a cause of action and remanded the case to the District Court for trial.

To begin with, the Circuit Court noted the relationship between the engineering company and the brewing company and the important part this relationship played in the existence of the cause of action. The court stated:

"It is to be remarked, in passing, that the question whether the relation of the engineering company toward the brewing company was or was not in fact that of independent contractor is, of course, open for determination upon the evidence as it shall appear upon the trial." 184 Fed. 426, 429.

The court further stated:

" \* \* \* It is a general rule of law that a principal or employer is civilly responsible for wrongs committed by his agent or servant while acting within the scope of the employment of the agent or servant. I Thompson on Negligence, §§ 518, 520, 526. The rule of law is likewise general that where a principal or employer is not in fault, but has nevertheless been compelled to pay damages to a third person for the negligence of his agent or employee, he may maintain an action over against such servant or employee to recover what he has

been compelled to pay. Story on Agency (9th Ed.) § 217; 4 Thompson on Negligence, § 3870. The brewing company thus had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate." 181 Fed. 426, 431.

Finally on Page 431 of the opinion the court states:

" \* \* \* The ground of the recovery sought is that the engineering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss." 184 Fed. 426, 431.

It can thus be seen that in this case relied on by the Appellant, we have a situation entirely different from the case with which we are concerned. There was a contractual relationship between the engineering company and the brewing company. There was an installation by the engineering company of mechanical equipment for the brewing company and as a result of this contractual relationship there arose between the engineering company and the brewing company certain duties. It was for a determination of the liability and obligations connected with this relationship that the Circuit Court remanded the case to the District Court. In the instant case, there can be no contention that any relationship existed between Pacific Quaker Rubber Co., the employer of the deceased, and the Appellees and there consequently could be no breach of any duty because in fact no duty existed between Appellees and Pacific Quaker Rubber Co.

The next case relied upon by Appellant is the case of *Staples, et al. vs. Central Surety and Insurance Co., et al.*, 62 Fed. 2d 650 (10 C.C.A. 1932). Appellees feel that by relying on cases similar to the Great Lakes Engineering Co. case and other cases wherein a relationship existed between the wrongdoer and the party seeking to recover on the basis of indemnity, the court arrived at an erroneous decision. Appellees contend that an examination of the authorities cited by the court in its opinion will reveal that the cases are either cases involving statutory or contractual subrogation, assignment, or cases wherein a duty was owed by the wrongdoer under the common law of negligence and that the court erred in its holding that under the facts of the case Central Surety and Insurance Corporation was entitled to recover against Staples.

A well-reasoned opinion and one which Appellees think is of great help in understanding the questions raised by the Appellant in this case and the error made in the Staples case is the case of *Crab Orchard Improvement Co. vs. Chesapeake & Ohio Railway Co.*, 115 Fed. 2d 277 (4th C.C.A. 1940). In this case an employee of the plaintiff, Crab Orchard Improvement Co., was killed in the course of his employment by the alleged negligence of the defendant railway company. Under the compensation law of West Virginia, where the accident occurred, plaintiff was required to pay into a state fund the sum of \$4,000.00. Plaintiff further alleged that due to an increase in premium, it was additionally damaged in the sum of \$11,000.00. An action was brought against the railway company alleging damages in the sum of \$15,-

000.00. On the motion of defendant, the action was dismissed by the District Court of the United States for the Southern District of West Virginia. The question raised in the District Court and the contentions of the appellant on the appeal are set forth in the opinion as follows:

"As the District Court stated (33 F. Supp. at page 582): 'The question presented in this case is whether an employer who has been forced to pay compensation or death benefits to the dependents of one of its employees who was killed in the course of his employment as a result of the negligence of a third party, may recover the amount so paid, through no fault of its own, from the negligent third party, in the absence of any provision for subrogation or assignment in the Compensation Act by virtue of which the payments were made.'

"As we view the appellant's theory of the case, there are three specific phases to this question: (1) Has the employer a common-law right of subrogation against the third party tort-feasor? (2) Has the employer a quasi-contractual action for indemnity against the tort-feasor? (3) Has the tort-feasor, by his negligent injury of the employee, breached a legal duty owed to the employer, so as to give rise to a civil action?" 115 F. 2d 277, 279.

Under the laws of West Virginia, no subrogation is given to the employer on account of payments to the State Fund. In our instant case, Maryland Casualty Company disclaims any attempt to base its action upon a right of subrogation; so, consequently, the court's opinion in the Crab Orchard Improvement Company case on Question (1) is of no concern here.

On the question of subrogation, however, the court makes the following comment concerning the Travelers'

Insurance Company vs. Great Lakes Engineering Works case:

"Before we leave the doctrine of subrogation, mention should be made of the case of Travelers' Ins. Co. v. Great Lakes Engineering Works Co., 6 Cir., 1911, 184 F. 426, 36 L.R.A., N.S., 60. That case, we think, was really decided on principles of agency; but, insofar as it supports the application of the doctrine of subrogation to the factual situation under discussion we do not feel obligated to follow it." 115 F. 2d 277, 281.

The court then takes up the question of whether the Crab Orchard Co. has an action against the wrongdoer based on indemnity:

"(11, 12) We next consider that phase of appellant's theory which deals with the principle of indemnity. This principle is closely interrelated with the principle of subrogation, and oftentimes, the possessor of the one right is also the possessor of the other. Cf. Restatement of Restitution § 76g. In any event, much of what has been said in reference to the doctrine of subrogation, as here considered, will apply with equal force to the doctrine of indemnity. A broad definition of indemnity is offered in section 76 of the Restatement of Restitution: 'A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.' A scanning of this definition reveals that the indemnity principle is more limited in application than that of subrogation. Not only must a benefit be conferred upon the defendant by a discharge of his duty or obligation, but the discharge must have occurred under circumstances in which the plaintiff was, at the same time, discharging a

personal obligation coextensive with that of the defendant.

"(13) We think that there is no factual basis here which justifies indemnification. As has been pointed out above, the third party tort-feasor receives no benefit by the employer's payment under the Act. Furthermore, as the duty and obligation of the employer are different and distinct from the duty and obligation of the third party tort-feasor, the requisites for the application of the indemnity principles are not met. A similar conclusion was reached in *McCullough v. John B. Varick Co.*, supra, 10 A. 2d at page 247:

"'Normally the right to indemnity arises only when there has been a discharge by one person of a duty also owed by another. \* \* \*

"'Clearly this is not a case for indemnity within the principles thus stated. The duty of an employer to pay compensation under the statute is entirely separate and distinct from the duty of a third person to pay damages to a servant for personal injuries caused by his negligence. \* \* \*

"We, therefore, conclude that the essential legal obligations from which a right to indemnity may arise, are lacking in the present case.'

"If a contrary conclusion were reached, the result would be to impose upon the appellee a double liability, which would require it to pay both damages at common law for the injury to the employee, and also the amount of compensation already paid by the appellant.

"\* \* \* Staples v. Central Surety & Insur. Corp., 10 Cir., 1932, 62 F. 2d 650, 653, held that under the Oklahoma Compensation Law the employer, as a result of the negligence of the tort-feasors, \* \* \* had a cause of action, in his own right, for indemnity against appellants (tort-feas-

ors), at common law entirely independent of any provisions of the Compensation Law \* \* \*. The court reached this conclusion by regarding compensation under Workmen's Compensation Acts as analogous to property or indemnity insurance. 62 F. 2d at page 654. In this view, we believe that the learned court fell into error. We have already stated our reasons for preferring the closer analogy of Workmen's Compensation Acts to life and accident insurance." 115 F. 2d 277, 282.

In answering the third question raised by the Crab Orchard Improvement Co., the court stated:

"(14) (15) Appellant proceeds upon the final theory that appellee breached a legal duty owed to appellant, and that this breach is actionable. This theory predicates appellee's liability to the appellant on the ordinary principle of tort-liability—that appellee's negligence was the proximate cause, in a chain of causation, resulting in damage to the appellant. The courts, however, have quite uniformly treated such damages as too remote and too indirect to support a recovery. (citations) No legal duty is here owed by the tort-feasor to the employer." 115 F. 2d 277, 282-283.

Two of the cases cited by appellant in our present case were cited to the court in this case. Concerning them the court makes the following observation:

"Appellant cites many cases to support his views. E. g., George A. Fuller Co. v. Otis Elevator Co., 1918, 245 U.S. 489, 38 S. Ct. 180, 62 L. Ed. 422; Washington Gas Light Co. v. District of Columbia, 1896, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712; The No. 34 (L. Boyer's Sons Co.), 2 Cir., 1928, 25 F. 2d 602; Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., D. C. N.D.W.Va. 1912, 194 F. 1011. But these cases are distinguishable. In each of them, the parties seeking indemnity either dis-

charged an obligation for which the defendant was primarily responsible to the injured person, or there existed a contractual or a substantially similar legal relationship between plaintiff and defendant, or else there was a direct breach of a legal duty owed by the defendant to the party seeking indemnity." 115 F. 2d 277, 283.

The opinion concludes with an observation by the court that appropriate legislation is the means for creating in the employer or his insurer the rights which appellant is here seeking to create and enforce:

"Accordingly, in the absence of appropriate legislative action, we must follow the opposite rules and principles of the common law. Under the application of these rules and principles to the instant case, the appellant, we believe, is not entitled to the relief that it seeks." 115 F. 2d 277, 283.

A careful reading of the Crab Orchard Improvement Company case will, we think, impress the court with the soundness of the decision. Judge Dobie has made a careful analysis of the previous decisions in the matter and the conclusion reached is one that will withstand a careful scrutiny. It should be noted that this case was decided in 1940, whereas the Staples case was decided in 1922. The trend of the law which appellant contends was started with the Great Lakes Engineering Works Company case in 1911 and brought to fruition in the Staples case in 1922, was not followed some eighteen years later. Finally, it should be observed that the Crab Orchard Improvement Company case was denied certiorari by the Supreme Court of the United States, 312 U.S. 702, 85 L. Ed. 1135, 61 Sup. Ct. 807.

The Crab Orchard Improvement Co. case was cited by this Court in the recent leading case, *Standard Oil Co. of California, et al. vs. United States*, 153 F. 2d 958 (9th C.C.A. 1946). In that case the United States brought an action against Standard Oil for wages paid to a soldier during disability and his hospital expenses caused by injuries received when he was struck by a truck of the defendant. The lower court allowed the recovery, but this Court reversed the holding.

" \* \* \* In *Crab Orchard Improvement Co. vs. Chesapeake & Ohio Ry.*, 4 Cir., 115 F. 2d 277, and *The Federal No. 2*, supra, 2 Cir. 21 F. 2d 313, it is held that in the absence of contractual or statutory right, the party paying wages and medical expenses is not entitled to subrogation or indemnification." 153 F. 2d 958, 963.

The final paragraph of the opinion succinctly refutes the contention of the Appellant that it has an action based upon indemnity without a statutory basis:

"In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one." 153 F. 2d 958, 964.

On appeal to the Supreme Court, the case was affirmed. 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067. Justice Rutledge, speaking for the court, reiterates the proposition that a new cause of action should be based upon the legislation and not be created by the Judicial branch of the government:

" \* \* \* The only question is which organ of the government is to make the determination that

liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch." 332 U.S. 301, 316-317; 91 L. Ed. 2067, 2076; 67 S. Ct. 1604, 1612.

Appellant cites the case of *Travelers Insurance Company vs. Northwest Airlines, Inc.*, 94 F. Supp. 620 (U.S. District Ct., W. D. Wisc.). It appears to have a factual situation similar to that of this case. The Court's opinion which is the ruling on defendant's motion to dismiss, does not indicate whether a Pre-Trial Order had been entered or whether there had been an agreement between the parties as to the facts. It does appear that the action was filed the same year that the decedent was killed so no Statute of Limitations question was involved. If the opinion is authority for the proposition that a cause of action in favor of Travelers Insurance Company was created in addition to the liability created by the Wrongful Death Statute of Wisconsin, Appellees feel that the District Judge was in error. Appellees feel that this error is predicated on too general an interpretation of the text material in *Corpus Juris Secundum* and American Jurisprudence.

Comparing the Northwest Airlines case and our present case with the text material quoted by the District Judge the following discrepancies appear:

(1) Neither plaintiff was "exposed to liability" by the wrongful act of the defendant. No action could have been brought against the plaintiff on account of the wrongful act of the defendant. The liability of the plain-

tiffs was created by the contract of insurance they made with the respective employers and that liability existed whether the defendants were negligent or not.

(2) Neither plaintiff had to pay damages as a result of the death. Damages as a result of injury to the person or death are defined and limited by the law of the state where the injury or death occurs. The measure of damages which an injured person may recover, or which his successors in case of death may recover, is set by certain standards. The amount paid by the plaintiffs was fixed and set by a separate statute and has no connection with the damages which are recoverable in an action by the injured party or his successors in case of death. If either plaintiff had failed to make compensation payments to the widow and the widow had sued, the damages or her recovery would not necessarily have had a relation to the damages she would recover in an action against the wrongdoer. Finally an award to a widow or an injured employee of compensation payments gives no benefit to the defendants.

The Restatement of Restitution, § 76 contains a more accurate and specific definition of indemnity than that of other texts. The authors have apparently taken care to include in the definition the requisites of an action for indemnity:

“§ 76. A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.”

The crux of an action for indemnity is that the duty discharged by the plaintiff must be a duty that was owed by the defendant and that as a result of the discharge, the defendant has received a benefit. In this case, the duties of defendant to James Buie were to operate the truck in the manner prescribed by law and to pay damages to his estate as defined and fixed by the Oregon Wrongful Death Statute. The duty of plaintiff to the widow of James Buie was a duty created by the contract of employment, the statutes of the State of California, and by appellant's contract of insurance, and is a separate and distinct obligation from that of the defendants. The defendants received no benefit by reason of plaintiff discharging its obligation through the employer to the widow of James Buie. We have two separate and distinct obligations which are not related and the discharge of one does not discharge the other so that one of the parties is benefited by the fact that the other party makes a payment.

Finally, we call the Court's attention to a very recent work, "Subrogation Under Workmen's Compensation Acts", by William B. Wright. This work was published in 1948. The author has gone into the question of recovery by an employer or his insurance carrier for compensation and other payments made on account of injuries caused by a third party. The author has referred to many leading cases and covers the question quite thoroughly. At no place in the work does he refer to a cause of action based upon indemnity as the appellant is contending for here. We particularly direct the Court's attention to the following three sections:

"Sec. 4. The workmen's compensation acts do not create the legal liability of a third person for an injury or death of an employee. To the extent of the recovery allowed by the act, the common law action of the employee is preserved and the workmen's compensation act regulates who shall prosecute the action and specifies who shall be the recipient of the damages recovered. Whether insurer and employer can recover the amount of compensation payments from a third party depends on whether the injured employee, or, in death cases, his dependents, could have recovered against the third person if he had brought the suit for damages. The liability or the amount of liability of the tort-feasor causing the injury to the employee is not dependent upon the fact that compensation has been paid or awarded."

"Sec. 9. The question of the substantive right to recover at common law or under the death statutes against a tortfeasor whose act caused the injury or death, the nature of the right and the parties in whom it is vested is determined by the law of the place where the injury or death occurred. \* \* \*

"Sec. 10. As the action which the employee, employer or insurance carrier prosecutes is one at common law and not by virtue of a right that he acquires under the compensation act, the time in which the right to sue is prescribed is that set out in the Statute of Limitations or by the death statutes. So far as the third party tortfeasor is concerned the period during which suit may be brought is not usually lessened by the workmen's compensation act although provisions have been inserted in some acts requiring the employee to sue or elect to sue within a specified definite period upon penalty of having his cause of action assigned to his employer by operation of law. Under such provisions it has been held that the employee cannot sue after the cause of action has been assigned to his employer by operation of law, although it has also been held that the purpose of the requirement is to establish a definite arrangement between the employer and

the employee and the employer, if he sees fit, may waive the provisions and the matter is of no concern of the third party who has wrongfully injured the employee.

"By the weight of authority, neither the assignment nor subrogation extends the time in which the employer or the insurance carrier may institute proceedings against the third party and where the statute merely transfers to the person paying the compensation the same cause of action which the employee possessed, the new party must bring his suit within the time prescribed for the employee, the prescribed time running from the date of the injury or death and not from the date of the award of compensation or the date of the payment of compensation."

## CONCLUSION

James Buie was operating an automobile on a highway in the State of Oregon. This automobile collided with a truck being operated by the Appellees through their agent. As a result of this accident, James Buie was killed. Plaintiff alleges that the defendants were negligent and that this negligence caused the death of James Buie. At this point, the tort, the wrongful act, if any, had been committed and had been committed in Oregon. Because of a contract of employment made in California, a contract of workmen's compensation insurance between Appellant and the employer and because of the statutes of the State of California, Appellant was required and is being required to make compensation payments to one Norma Buie.

It is an uncontradicted proposition that the law of the place where the tort is committed governs as to whether there will be a recovery and the extent of the recovery, if any. Goodrich on Conflict of Laws, 3rd Edition, Section 92, points out:

"The general rule is that the creation and extent of tort liability is governed by the law of the place where the alleged tort was committed."

The same author on page 262 states:

" \* \* \* No case in this country has been found where recovery in tort has been allowed for what was not the basis of an action by the *lex loci delicti*."

In Section 102 of the same work, Goodrich states:

"No action may be brought of injuries resulting in the death of a human being unless an action is given by the law of the state where the injury occurred."

In 16 American Jurisprudence, Death, we find the following observations which are so generally accepted that we feel further elaboration upon them will be unnecessary.

**"Sec. 389. RIGHT OF ACTION—**It is established by the overwhelming weight of authority that the existence of a right of action for wrongful death must be determined by the law of the place where the fatal injury was inflicted."

**"Sec. 396. PARTIES—**The general rule is that an action for wrongful death is maintainable only in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted."

"Sec. 404. **GENERALLY**—The rule that the existence of a right of action for wrongful death and all other matters pertaining to the substantive right must be determined by the law of the place where the fatal injury was inflicted is not affected by the fact that another state was the locality of the entry into a contract of employment, or for transportation between the defendant and the deceased, or the locality where the negligence which caused the accident resulting in death occurred or the locality where the death occurred."

Section 8-903, Oregon Compiled Laws Annotated, as it read in 1947, the time of James Buie's death is as follows:

*"Action by personal representatives for wrongful death: Limitations: Amount recoverable.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

Appellant makes no contention that any of its rights arise from the foregoing statute and in fact deny that the foregoing statute has anything to do with its cause of action for the very obvious reason that James Buie was killed in October, 1947 and the present action was not filed until two years and seven months later.

While Appellees were operating their truck in the State of Oregon, they were subject to certain common

law and statutory requirements as to the manner in which said truck was operated. They owed a duty to obey the traffic rules and to operate the truck in a careful and prudent manner. If they failed to follow said rules, they were negligent and if said negligence resulted in an accident, the Appellees were responsible to those who the law of the State of Oregon designates for protection from the tortious acts of the Appellees. It will need no more than brief mention to state that Appellees as they were operating their truck did not owe to the Maryland Casualty Company a separate, distinct and additional duty over and beyond the duties owed by Appellees to other persons using the highway. The proposition is so basic that Appellees will quote only Harper on Torts, Section 73:

"Since negligence is a breach of the duty to use reasonable care, it appears that the duty to take this or that precaution will be owing to some definite person or class of persons, viz., those imperiled by the general type of risk or danger threatened. \* \* \*

If Appellant was attempting to claim some right which James Buie had, or some right which Norma Buie has, or the estate of James Buie has through subrogation or assignment, we would have a different proposition, but Appellant claims it has a separate cause of action and asks this Court to create in Appellant a cause of action on account of a contract made in California and statutes of California. If the legislature of California can create tort liability for a tort committed in Oregon or enlarge the tort liability for a tort committed in Oregon or extend the time in which an action must be

commenced for a tort committed in Oregon, the result would be chaos. The result would be that ever tort committed in one state would be subject to liability as defined and created by the legislature and courts of every other state in the union. This is not the law and woe to the legal profession if it ever should become the law.

It must be remembered that the Appellant, an insurance company, for a premium, probably paid in advance, undertook and agreed to pay compensation for injuries and death suffered by employees of Pacific Quaker Rubber Co., the employer of the deceased Buie. The Appellant does not contend and cannot contend that the Appellee ever received any consideration to be held liable in the event of an accident with the employee Buie. The only basis on which Buie could have recovered damages in the event of injury was under the laws of Oregon, and the only basis on which the Estate of Buie could have recovered damages was under Section 8-903 Oregon Compiled Laws Annotated. The statute is plain and specific and is the only statute in Oregon applying to the case at bar. Prior to the enactment of Section 8-903, there was no right of action in Oregon for wrongful death. We do not believe the legislature of the State of California, can enact a law, which sets aside the only statute of Oregon, giving a cause of action in the event of wrongful death.

As for the Appellant's contention that an action of indemnity will lie here, we state that in addition to the reasons set forth in the foregoing brief why this situation does not fit the requirements of an action for indemnity,

Appellant has asked this court to create a cause of action which has not heretofore existed under the laws of the State of Oregon. There is no legislative basis for the cause of action and there is no basis in the opinions of the Supreme Court of the State of Oregon for such an action. In fact, outside of the Staples case and the Northwest Airlines case, Appellees are convinced that no basis for the cause of action as set forth in this case can be found in any reported case or any text. As Justice Rutledge stated in *United States vs. Standard Oil Company*:

“ \* \* \* Until it acts to establish the liability, this Court and others should withhold creative touch.” 332 U.S. 301, 317; 91 L. Ed. 2067, 2076; 67 S. Ct. 1604, 1612.

Appellees respectfully submit that the District Judge was correct in his ruling and his dismissal of Appellant's case; and that Appellant's complaint does not state facts sufficient to constitute a claim either:

- (A) on the basis of the law of the State of California, or,
- (B) on the basis of an action for indemnity.

Respectfully submitted,

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*Attorneys for Appellees.*



No. 12937

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**United States  
COURT OF APPEALS  
for the Ninth Circuit**

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MARYLAND CASUALTY COMPANY, a corporation,  
*Appellant,*

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,  
Doing Business as PARAMOUNT SERVICE,  
*Appellees.*

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**APPELLANT'S REPLY BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**United States  
COURT OF APPEALS  
for the Ninth Circuit**

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MARYLAND CASUALTY COMPANY, a corporation,  
*Appellant,*

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,  
Doing Business as PARAMOUNT SERVICE,  
*Appellees.*

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**APPELLANT'S REPLY BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

---

**INTRODUCTION**

From a study of the briefs the following facts and  
legal propositions appear undisputed:

**1. AGREED FACTS:**

There is no dispute in this case as to the facts or the  
inferences to be drawn therefrom. Simply stated, it is  
agreed that James Buie was hired in California, was

subject to the California Workman's Compensation Act and was killed in Oregon by what must be assumed to be the negligent and wrongful act of the Appellees. The Appellant under the California Compensation Act became obligated to pay \$6300.00 to Buie's widow because of his death.

## 2. AGREED LEGAL PRINCIPLES:

(a) Appellant concedes that it cannot rely on being subrogated to any action that Buie, his widow or personal representatives may have had under the Oregon wrongful death act, as any such action is barred by the statute of limitations.

(b) Appellees concede that if Buie had been killed in California the law of California would give the Appellant an enforceable statutory cause of action based upon the admitted facts (Appellees' Brief, pages 3 and 4).

## 3. DISPUTED LEGAL QUESTIONS:

(a) Do the admitted facts support the application of the common law right of implied indemnity?

(b) Does the fact that this accident occurred in Oregon prevent the creation, in Appellant's favor, of a cause of action based on the California law?

## THE ARGUMENTS UPON THE CALIFORNIA LABOR CODE

1. Appellee's Argument, pp. 3, 4, Appellees' Brief: If the accident had occurred in California, Appellees

concede Appellant would have a cause of action. But Appellees contend that it would be giving extraterritorial application to the California law to permit the enforcement of the employer's cause of action against a tortfeasor whose wrong occurred in Oregon.

**REPLY:** As Appellant's initial brief strove to elucidate, the California law creates in the employer or insurer an independent cause of action for recovery of compensation paid on account of the tortious injury or death of the employee. The California law operates, as Appellees concede (p. 6, Appellees' Brief), upon accidents occurring outside the State. Given these postulates, it seems to accord with logic and justice to say that an accident in Oregon which resulted in a liability in California created a cause of action *in California*, to which the Appellees should respond wherever service can be obtained.

The argument of "extraterritoriality" is specious. California's statute operates extraterritorially *as against the employer or insurer*, but this is obviously no concern of the tortfeasor. This extraterritorial operation creates a cause of action, in California, against the tortfeasor. To enforce that cause of action elsewhere is a perfectly normal concomitant of the federal system of government. Probably the majority of causes of action, including statutory private liabilities, can be prosecuted wherever process exists.

2. Appellees' Argument, pp. 4, 5, Appellees' Brief: Appellees cite the case of *Personius vs. Asbury Trans-*

portation Company, 152 Ore. 286, 53 P. (2d) 1065 (1936).

REPLY: All that need be said of this case is that it concerned a statute fundamentally unlike the California Labor Code, with respect to the employer's right over against the tortfeasor. The Idaho statute involved in the *Personius* case *subrogated* the employer to the employee's cause of action. The cardinal feature of the California statute is the investment of the employer or insurer with a new, original cause of action.

The one feature of this case which seems to console Appellees is the statement: "The prohibition imposed on the Idaho courts has no extraterritorial effect on the courts of this state." *This has no bearing on our case whatever.* The question in the *Personius* case was whether an employer, to whom the Idaho compensation act ostensibly assigned the employee's cause of action against the tortfeasor, was the only one who could enforce a cause of action arising out of an Oregon injury. As is pointed out in the quotation from the opinion a workman is not so precluded from maintaining an action under Idaho law. In our case, the question is not one of "parties" but the enforcement of an entirely separate cause of action.

3. Appellees' Argument, pp. 6, 7, Appellees' Brief: Appellees seek to dispel the clear implications of the cases of *Sloan v. Appalachian Electric Power Co.*, 27 F. Supp. 108 and *Biddy vs. Blue Bird Air Service*, 374 Ill. 506, 30 N.E. (2d) 14 (1940).

**REPLY:** These two cases were introduced by Appellant to show that where an employee, subject to the Compensation Act of state A, is injured in state B, and an action is commenced in state B, the court will recognize the substitution of the employer or insurer effected by the compensation laws of state A. This is far more "extraterritorial" than anything we are invoking in this case, because while the Sloan and Biddy cases involved mere subrogation, this case is one where the Appellant has its own independent cause of action. Appellant, that is, is not asserting that a California statute affected an Oregon cause of action as was true in the Sloan and Biddy cases.

## **THE ARGUMENTS UPON INDEMNITY**

1. Appellees' Argument, pp. 8, 9, Appellees' Brief: Appellees challenge the importance of *Travelers Insurance Co. vs. Great Lakes Engineering Works Co.*, 6 Cir., 184 Fed. 426, by an exaggeration of a single feature of that case. In that case, the engineering company installed a defective boiler for the brewing company; the boiler exploded, killing one brewery worker and injuring another. The brewery company's insurer paid compensation and sued the engineering company. Appellees claim that this case is "entirely different from our present case" because there was a contractual relationship between the engineering company and the brewing company, where there was no such relation between the parties herein.

**REPLY:** As Appellant noted in its brief, the existence of a contract between the engineering company and the brewing company did *facilitate* the finding that the engineering company owed a duty to the brewing company not to expose the brewing company to compensation liability by injuring the brewery workers. But is it not obvious that this duty is itself a manifestation of the indemnity principle? Furthermore, the *Travelers* case is undeniably one of the great precursors of the modern development of the doctrine of implied indemnity. It molded the earlier laws of "subrogation" into the modern law of indemnity.

As Appellant's initial brief more fully explains, the *Travelers* case is of great importance to this case, and regardless of the existence of a contract between the brewery and the engineering company, it found an *implied* duty, flowing to the employer, not to inflict liability upon the employer for compensation. It is obvious—in fact it is one of the main elements of the decision—that the employer's cause of action is independent of the employee's cause of action. It is equally obvious that the employer's cause of action springs from the imposition of a form of compensation liability. And, finally, the employer's action bears no relation to the wrongful death statute in the event the employee is fatally injured.

Assimilating these salient points to our case, no one can soberly claim that the *Travelers* case is a mere museum piece resting on "entirely different" considerations.

2. Appellees' Argument, p. 10, Appellees' Brief: Appellees say: "In the instant case, there can be no contention that any relationship existed between Pacific Quaker Rubber Co. (sic), the employer of the deceased, and the Appellees and there consequently could be no breach of any duty because in fact no duty existed between Appellees and Pacific Quaker Rubber Co."

REPLY: While this announcement may be regarded simply as begging the question, it may be added that the chief effect of the doctrine of indemnity is to create a duty between persons in the roles of Appellees and Appellant here. There could be and was a breach of a positive duty not to cause Quaker Pacific Rubber Company (or its insurer) liability to its employees, and the breach of this duty is the very one which may be redressed by the action for indemnity.

In *Oceanic Steam Navigation Co. vs. Compania Transatlantica Espanola*, 134 N.Y. 461, 31 N.E. 987 (1892), a lessee was sued for injuries caused by the negligence of a sublessee. The lessee sued the sublessee for indemnity. The Court said:

"Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled

(by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." 31 N.E. 987, 989.

3. Appellees' Argument, p. 11, Appellees' Brief: Appellees disparage the case of *Staples, et al. vs. Central Surety and Insurance Co.*, 10 Cir., 62 Fed. (2d) 650 (1932).

REPLY: In their rather categorical depreciation of the *Staples* case, Appellees implicitly admit that it is highly pertinent to this matter, though they question the propriety of the decision. Appellees are, we believe, demonstrably wrong in feeling that the *Staples* case misapprehended the precedents which it quoted. By the time of the *Staples* case (1932), the principle of implied indemnity was firmly settled. The *Staples* case merely utilized it in a modern workmen's compensation situation.

4. Appellees' Argument, pp. 11-16, Appellees' Brief: The *Crab Orchard Improvement Co.* case is patently the keystone of Appellees' legal argument against indemnity.

COMMENT: The *Crab Orchard* case seems to repose mainly upon the authority of the Restatement of the Law of Restitution, sec. 76, in its rejection of the doctrine of indemnity. With respect to court decisions, the *Crab Orchard* case refers to the *Staples* case and to the old case of *Travelers v. Great Lakes Engineering Works* and, recognizing that they represent the princi-

ple for which we contend, simply refused to adopt their precept. The Court also attempted to distinguish several other cases cited by Appellant in its brief. Appellant leaves it to this forum to choose between the policies represented by the *Crab Orchard* case, on the one hand, and the *Staples* case on the other, for they are squarely in conflict.

The Restatement of Restitution, sec. 76, is apparently the mainstay of the *Crab Orchard* case. The opinion states that for a right to indemnity to arise,

“Not only must a *benefit* be conferred upon the defendant by a discharge of his duty or obligation, but the discharge must have occurred under circumstances in which the plaintiff was, at the same time, discharging a personal obligation *coextensive* with that of the defendant.” (Italics added)

The opinion then continued, with reference to the present sort of circumstances,

“ . . . the third party tort-feasor receives no benefit by the employer's payment under the Act. Furthermore, as the duty and obligation of the employer are different and distinct from the duty and obligation of the third party tort-feasor, the requisites for the application of the indemnity principles are not met.”

As a preliminary comment, it must be observed that Restatement of Restitution, sec. 76, is obviously ill adapted to questions of indemnity growing out of torts. It seems to have been regarded by its authors as pertinent to contractual matters. Restatement of Restitution, sec. 86, is more nearly related to delictual situa-

tions, but has not been extensively interpreted. It may well be that the Restatement of Restitution does not cover a compensation question like this one.

However, to meet the Appellees on their own ground, as a precaution, we turn to the elements of "benefit to the tort-feasor" and "coextensive obligation", which the *Crab Orchard* case emphasized. Several opposing cases show that these two elements either exist in cases like this, or are not actually required—it is immaterial which.

Under the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., sec 905 ff, an employer is not liable in damages to his employees, but the employees can sue third parties for their injuries. In a group of recent cases under that Act, the workman has recovered from a third party; and the third party has in turn sued the employer (who was the active wrongdoer) and recovered on the ground of indemnity. *United States vs. Arrow Stevedoring Co.*, 9th Cir., 175 F. (2d) 329 (1949); *United States vs. Rothchild*, 9th Cir., 183 F. (2d) 181 (1950); *Rich vs. United States*, 2d Cir., 177 F. (2d) 688 (1949). A very similar example under a State law is *Westchester Lighting Co. vs. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. (2d) 567 (1938). In *Ruby Lumber Co., et al. vs. Johnson*, 299 Ky. 811, 187 S.W. (2d) 449 (1945), the law of Kentucky forbade an injured workman from suing either his employer (a subcontractor) or the general contractor. The workman recovered compensation from his employer, and his employer sued the general contractor on the ground that the general contractor's ac-

tive negligence had caused the injury, and therefore a right of indemnity existed. The general contractor defended on the same grounds suggested by Appellees here: that since the employee could not sue the defendant directly, then the employee's employer cannot do so either. The Court held that an independent right of indemnity existed, which bore no relation to the employee's claim.

While in these cases a contract of some sort existed between the employer and the third party, this is not a controlling factor. *Oceanic Steam Navigation Co. vs. Compania Transatlantica Espanola*, supra. In these cases, since the employer or defendant cannot be held liable directly to the employee, how can the third party's payment of compensation to the employee be deemed a "benefit" to the employer? If the employer or defendant is not liable to the employee for damages, how can it be said that the liability of the employer and the third party are "coextensive"? Yet indemnity is allowed.

Moreover, of course, indemnity was allowed in the *Staples, Travelers vs. Great Lakes Engineering Works Co.*, and other cases cited in Appellant's brief, and in the *Northwest Airlines* case, infra. In all of these cases the elements of "benefit" and "coextensive obligation" would doubtless be pronounced lacking by the Appellees —yet indemnity was allowed.

5. Appellees' Argument, p. 15, Appellees' Brief: Appellees make the point that the *Crab Orchard* case was decided in 1940, "whereas the *Staples* case was decided

in 1922". The *Staples* case was decided on the 21st day of December, 1932.

Moreover, the *Staples* case, while it was not followed in 1940 by the *Crab Orchard* case, was followed at the end of 1950 in *Travelers Insurance Co. vs. Northwest Air Lines*, 94 F. Supp. 620, which is, on its facts closer to our case than any other that can be found.

6. Appellees' Argument, p. 17, Appellees' Brief: Appellees discuss the case of *Standard Oil Co. of Cal. vs. U. S.*, 9th Cir., 153 Fed. (2d) 958. It recites a portion of the opinion in this Court wherein the *Crab Orchard* case is mentioned.

REPLY: We believe that Appellees have misconstrued the utterances of this Court. The *Standard Oil* case was one in which the Government tested various theories in an effort to obtain reimbursement from the Standard Oil Co. for the latter's injury of a soldier. It appeared that the soldier gave, for a consideration, a release to the Standard Oil Co. for his damages. The Circuit Court said:

"Therefore, Etzel's release to the defendants, which extended 'to all claims of every nature and kind whatsoever', covered his lost wages and medical expenses as elements of damage. These are the amounts which the United States here seeks to recover. Thus even if we may assume that the United States may be subrogated, without statutory authority, to the soldier's claims, it cannot be subrogated to such claims here because defendants have already paid Etzel for these losses. For the same reason the government would have no rights of in-

deminification, even under the broad rule of Restatement of Restitution, Section 76." 153 Fed. (2d) 958, 963. (Italics added)

It is obvious that the reference to the *Crab Orchard* case was mere dicta, the Court having already dispensed with the indemnity arguments on other grounds.

Nor is there any merit to Appellees' claim that this Court was speaking of an action for indemnity when it said that the courts should not "enlarge the scope of an ancient common law cause of action". The court was obviously referring to the Government's principal theory, which was that the Government has a right, corresponding somewhat to the very ancient right of a master to sue for the loss of his servant's services, or of a father to sue for torts to his children. This was the "ancient common law cause of action" which the Circuit Court refused to apply in the case of a soldier. And it is important to observe that the Circuit Court found basic differences between the relation of soldier and sovereign on the one hand, and civilian relations such as master-servant on the other. The Supreme Court, on appeal, ignored any question of indemnity.

Since the Supreme Court, in the appeal of the *Standard Oil* case, was speaking exclusively on the analogy of a soldier-government relation to the ancient family or servant status, the remarks by Justice Rutledge quoted by Appellees are not germane here.

And finally, the *Standard Oil* case as construed by the Supreme Court presented exclusively a federal issue.

7. Appellees' Argument, pp. 18, 19, Appellees' Brief:  
Concerning *Travelers Insurance Company vs. Northwest Air Lines, Inc.*

REPLY: Aside from the mention of some immaterial differences which probably do not exist, the Appellees simply disagree with this case, which, in view of its close support of Appellant's position on almost identical facts, is Appellees' only resort.

However, Appellees attack the *Northwest Air Lines* case on grounds of principle. Their first argument is that "Neither plaintiff was 'exposed to liability' by the wrongful act of the defendant. No action could have been brought against the plaintiff on account of the wrongful act of the defendant. The liability of the plaintiffs was created by the contract of insurance they made with the respective employers and that liability existed whether the defendants were negligent or not."

This is an unrealistic statement, to say the least. In both cases (ours and the *Northwest Air Lines* case) the insurer was "exposed to liability" in that binding orders of a competent tribunal were issued to compel them to pay several thousand dollars. This order in our case was made directly to Appellant. It was on account of the wrongful act of the defendant. To say that the insurer's liability to pay compensation is attributable solely to a contract of insurance, and not to the tort, is only partly true—the omitted element is the fact that someone other than the active wrongdoer had paid for the tort, and upon this element the doctrine of in-

demnity operates. It must be remembered that indemnity has the aspect of an equitable remedy.

The liability of the employer's insurer to the employee is unconditional in the case of a covered injury, whether that injury is caused by the tort of a third person or not. As against the tortious third person, however, the law of indemnity recognizes that, whether the insurer must pay in all cases or not, in *this* case payment was necessitated by a wrong, the consequences of which should ultimately rest on the wrongdoer. There is nothing unusual about this: it is the standard pattern of the right to tort damages.

Appellees' second argument is that "Neither plaintiff had to pay damages as a result of the death \* \* \*."

It is difficult to see what this argument tends to prove. Plaintiffs suffered loss because of the tortious injury of the employees. Plaintiffs sue to recoup this loss. There is no possible ground for requiring that the loss qualify as one incurred because of a wrongful death statute, as Appellees seem to argue. Perhaps Appellees feel that a tortfeasor is entitled to gauge the extent of his liability, in advance of his tort. The law has never made tort liability the subject of easy preliminary calculation. A tortfeasor opens Pandora's box without previous inspection.

8. Appellees' Argument, p. 19, Appellees' Brief: Concerning Restatement of the Law of Restitution, sec. 76, Appellees say that this section "contains a more accurate and specific definition of indemnity than that

of other texts."

**REPLY:** Appellant has already discussed this section of the Restatement of Restitution. We pause here only to deny that this section contains an adequate definition of indemnity as that subject is recognized by the Courts.

9. Appellees' Argument, p. 20, Appellees' Brief: Appellees call the Court's attention to a "very recent work, 'Subrogation Under Workmen's Compensation Acts'" by William B. Wright. Appellees make an argument based on a negative inference when they say: "At no place in the work does he refer to a cause of action based upon indemnity as the appellant is contending for here."

**REPLY:** The failure of a text writer to mention some rather prominent features of his chosen subject is hardly a basis for considering that that feature does not exist. If Mr. Wright ignored indemnity in his work, his judgment was faulty; and if he missed finding the law of indemnity, then he did not pursue his researches far enough to qualify him as an authority. In any event, his failure to mention indemnity, which is a likely answer to this case, eliminates him as a source of well-rounded information in this matter. Since he did not mention indemnity, which the *Travelers vs. Great Lakes* case, the *Staples* case and the *Northwest Air Lines* case all held was supplemental to the employee's cause of action, and distinct therefrom, no useful purpose is served in replying to the excerpts quoted from his work.

10. Appellees' Argument, p. 23, Appellees' Brief: Appellees, in their conclusion, quoting from Goodrich, "Conflict of Laws" state that "the law of the place where the tort is committed governs as to whether there will be a recovery, and the extent of the recovery, if any."

REPLY: This statement of law (with which we do not quarrel) must be related to Appellant's theory of its case. Appellant should prevail upon either a cause of action for property damage, created by the California Labor Code, or a cause of action for indemnity. The cause of action created by the California Labor Code is governed by the law of California. The cause of action for indemnity is doubtless of California origin, and it is not distinctively a tort claim, anyhow. In short, the excerpt from Goodrich has not much bearing on this case, since Appellees make the citation with reference to Oregon law. Goodrich is talking about tort liability and not indemnity liability.

11. Appellees' Argument, pp. 23, 24, Appellees' Brief: Appellees cite Goodrich, op. cit., sec. 102; and several sections from American Jurisprudence to the effect that no action can be brought for wrongful death except in conformity with the wrongful death statute of the state in which the fatal injury occurred.

REPLY: As Appellant has emphasized, this action is in no sense one for wrongful death. We repeat it here to dispel the references just mentioned.

12. Appellees' Argument, p. 25, Appellees' Brief: Appellees argue that they should be exonerated here because Oregon law does not designate persons in Appellant's position as entitled to protection from the vehicular torts of the Appellees; for which Appellees cite Harper on Torts, sec. 73, for the rule that a tortfeasor is liable only to those within the class imperiled by his negligence.

REPLY: Appellees inflicted damage upon Appellant by striking an employee covered by Appellant's policy of compensation insurance, whether that injury arose from the California Labor Code or the law of indemnity. Appellees' argument is that this injury was not within the scope of the harm threatened by Appellees' negligent driving, and hence Appellees should be exculpated under the doctrine of *Palsgraf v. L. I. R. Co.*, 248 N.Y. 339, 162 N.E. 99.

The doctrine of the *Palsgraf* case pertains to the actual incidents of a negligent accident, and contemplates such matters as what persons were within the range of harm, and what sort of damage could be apprehended. With respect to the *financial* consequences of a tort, the *Palsgraf* case is silent. This action is one for reimbursement of damages, and, if the *Palsgraf* case were seriously considered to apply here, it should be said that one can always anticipate paying damages when he is negligent. At any rate, the *Palsgraf* case has had no apparent effect in cases of this sort.

13. Appellees' Argument, p. 25, Appellees' Brief: Appellees express concern at the "chaos" which they claim will flow from the enforcement in Oregon of a California cause of action which is stimulated by an Oregon tort.

REPLY: Under either theory which Appellant advances here, double recovery by Appellant and anyone else is impossible. This is provided by the Labor Code in the case of the statutory cause of action, and by the courts in the case of the common law action for indemnity. The "chaos" of which Appellees speak, then, is the consternation of a tortfeasor required to discharge his debt.

For obvious Constitutional reasons, such as the requirements of due process, and for equally manifest practical reasons, no state can create a cause of action unless something has occurred which has a significant, substantial and actual effect within that state. Nor can a state offer a remedy where there is no wrong. Nor can a state create rights in a vacuum. Appellees' fears are mere phantasms so long as the Constitution requires the safeguards just mentioned.

Appellant submits that there was ample repercussion in California from the Oregon tort to justify, and validate, the creation of a cause of action against Appellees. Nor has the Legislature of California attempted to "set aside the only statute of Oregon, giving a cause of action in the event of wrongful death". The Legislature of California has nothing to do with the Oregon wrongful death act. It merely provided that in this particular

sort of case the Appellant has been remediably injured by the Appellees. It would be as disturbing as any frights the Appellees have professed if the Oregon Legislature, by enacting statutes, could bar litigants from acquiring in other states causes of action for the results, outside Oregon, of acts done within Oregon.

14. Appellees' Argument, p. 27, Appellees' Brief: Appellees cite the statement of Rutledge, J. in the *Standard Oil* case regarding the creation of a new cause of action.

REPLY: As we have explained above, this fragmentary utterance relates to something entirely foreign to the issues of this case. The creative touch has already been applied by the Supreme Court in the cases of indemnity, and liberally at that. The California Legislature has acted to establish a liability, too.

Respectfully submitted,

CAKE, JAUREGUY & TOOZE,  
DWIGHT L. SCHWAB,  
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Attorneys for Appellant.

No. 12938

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNION SULPHUR AND OIL CORPORATION,  
a Corporation,  
Appellant,

vs.

W. J. JONES & SON, INC., a Corporation,  
Appellee.

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Apostles on Appeal

---

Appeal from the United States District Court,  
for the District of Oregon.



No. 12938

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United States  
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UNION SULPHUR AND OIL CORPORATION,  
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Apostles on Appeal

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Appeal from the United States District Court,  
for the District of Oregon.



## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
District of Oregon

Civil No. 5200

ALLAN MARSHALL,

Libelant,

vs.

STEAMSHIP "HERMAN FRASCH," Her Boilers,  
Engines, Tackle, Apparel and Furniture,  
Respondent,

UNION SULPHUR AND OIL CORPORATION,  
a Corporation,

Claimant and Petitioner,

vs.

W. J. JONES & SON, INC., a Corporation,  
Respondent.

### PRE-TRIAL ORDER

Appearances:

Proctor for Libelant:

PAUL R. HARRIS,

Proctors for Respondent, Steamship Herman  
Frasch, and Claimant and Petitioner, The  
Union Sulpher Company, Inc.:

WOOD, MATTHIESSEN & WOOD,  
ERSKINE B. WOOD, and  
ROBERT L. DRESSLER.

Proctor for W. J. Jones & Son, Inc., a corporation, Respondent:  
**GUNTHER F. KRAUSE.**

### Nature of Action

This is a libel in rem brought by the libelant against the steamship Herman Frasch, which has been claimed by The Union Sulphur Company, Inc., for personal injuries received by libelant and is based generally upon the theory of unseaworthiness of the steamship Herman Frasch and negligence of the owners of said vessel resulting in said injuries to libelant. The respondent, W. J. Jones & Son, Inc., a corporation, was impleaded by The Union Sulphur Company, Inc., now known as the Union Sulphur and Oil Corporation and herein-after so called, claimant of the steamship Herman Frasch for the purpose of compelling it to contribute to or pay in whole any damages which may be decreed against The Union Sulphur and Oil Corporation on behalf of the libelant.

### Admitted Facts

1. That the libelant is a resident of the United States and the District of Washington, residing near Camas, Washington.
2. That the steamship Herman Frasch is an American steamship and during the pendency of process in this suit was within the District of Oregon and within the jurisdiction of the United States District Court for the District of Oregon.
3. The Union Sulphur and Oil Corporation,

claimant and petitioner herein, is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is the owner of the steamship Herman Frasch.

4. W. J. Jones & Son, Inc., is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with an office and a principal place of business in the City of Portland, Oregon.

5. That on or about the 13th day of October, 1949, the libelant was employed as a longshoreman by and under the direction of the W. J. Jones & Son, Inc., Stevedoring Co., who were unloading the ship as independent contracting stevedores under contract with the claimant, in and about the steamship Herman Frasch then lying alongside Terminal No. 2 and Dock in the City of Vancouver, Washington, and within the navigable waters of the Columbia River within the said Port of Vancouver, and within the State of Washington.

6. That on or about the 13th day of October, 1949, the libelant was directed by his employer to descend into the lower hold of No. 3 hatch of said vessel preparatory to assisting and discharging cargo therefrom, and while the libelant was using and descending upon a certain steel ladder which was permanently fastened to the after portion of said No. 3 hatch as a means of descending to said hold, one of the rungs of said ladder, which was unseaworthy at the time of the accident, gave way and libelant was precipitated into the hold of said

No. 3 hatch a distance of approximately 15 feet resulting in injuries to libelant.

7. That the accident complained of and the cause of action arising therefrom and upon which this libel is based, as well as the claim for recovery over by claimant against the impleaded respondent, are within the jurisdiction of the above-entitled court.

8. Hospital and medical services in the amount of \$393.60 were incurred in connection with libelant's injuries.

#### Contentions of Libelant

Libelant contends that said accident was caused without any contributing fault or neglect on his part by the defective, unsafe and unseaworthy condition of the vessel, and by the fault and negligence of the master and crew of said steamship in the following, among other particulars:

1. In that the rung of said steel ladder, which broke and gave way as above set forth, was old, worn out, defective and of improper strength at the time of the accident complained of and for a long period of time prior thereto, all of which resulted in said vessel being in an unseaworthy and defective condition at the time of said accident and for a long period of time prior thereto, and therefore, said ladder did not have firm and sufficient rungs to support the weight of libelant and other workmen employed to use said ladder for the purpose for which it was intended.

2. In that the master, owners, or charterers of said steamship failed and neglected to warn libelant

or his employer of the danger which existed due to the unseaworthy manner in which said rung of said steel ladder was maintained although the said vessel and its owners, master and charterers well knew of said unsafe and dangerous condition of said rung or should have known thereof.

3. In that the master, owners or charterers of said vessel, carelessly and negligently directed the libelant to work in an unreasonably defective and dangerous place where he was exposed to the extreme danger of being precipitated into said hold, due to the unseaworthy manner in which said rung of said ladder was maintained.

4. That the master, owners or charterers of said steamship carelessly and negligently failed and neglected to furnish, supply and use safe and adequate rungs in said steel ladder.

Libelant contends that by reason of the foregoing premises, while he was in the act of descending said ladder, he was violently precipitated into the hold of said vessel and received the following injuries which he claims were severe and permanent and will cause libelant to suffer severe and physical pain and mental anguish:

(a) The muscles, ligaments, tendons and nerves of libelant's back were severely injured, bruised and strained and libelant suffered a severe lumbo sacral strain and sprain.

(b) The muscles, ligaments and tendons of libelant's head were severely injured and bruised.

(c) The libelant received severe internal shock and injuries.

(d) Libelant received a severe shock to his nervous system.

(e) That as a result of said injuries, libelant suffers severe headaches.

(f) That prior to said accident, libelant had congenital deformities of his back and as a result of said accident, said condition was severely aggravated and all of which will retard libelant's recovery.

(g) That prior to said accident, libelant had a congenital pilonidal cist or sinus and as a result of said accident, said condition was severely aggravated and became actively infected, all of which necessitated a surgical operation.

(h) That libelant has lost  $6\frac{1}{2}$  months wages at the rate of \$300 per month for which he claims damages in the sum of \$1950.00.

Libelant further contends that at the time he received said injuries he was a longshoreman by occupation earning a salary of approximately \$300.00 a month and that as a result of said injuries libelant's earning capacity will be permanently reduced and impaired and that by reason of the foregoing injuries and damage to libelant, he has been damaged in the sum of \$25,000.00.

Libelant denies the contentions of claimant and of impleaded respondent except as admitted in libelant's contentions or in the admitted facts.

Contentions of Claimant and Petitioner, the Union Sulphur and Oil Corporation, as Against Libelant.

1. Claimant denies the foregoing contentions of

the libelant except as admitted in the admitted facts or as hereinafter admitted.

2. Claimant contends that the unseaworthy condition of the ladder did not exist at the time the vessel was turned over the stevedores for unloading, that at the time the vessel was turned over to the stevedores for unloading the ladder was suitable for use, and that the weakness in the ladder which caused it to give way while libelant was descending the ladder was caused after the vessel was turned over to the stevedores for unloading, and was caused by the stevedores themselves fastening their gear lines to the ladder or dragging their lines across the ladder, which weakened it.

3. Claimant contends that the injuries are not permanent.

4. Claimant contends that libelant's injuries were caused or contributed to by his own negligence in not observing the condition of the ladder and in not testing it in any way for strength, and in using that ladder at all when another and safer method of descending into the hold, to wit, a ladder through the escape hatch in the forward part of the hold, was available to him which was protected by heavy ship frames from damage, and which is customarily used in descending into the hold, and which was available to libelant.

5. Claimant alleges that libelant's injuries were caused or contributed to by his own negligence in using the ladder which gave way, when he knew or should have known that his employer had been improperly using the ladder to fasten the lines to,

and placing a strain upon the ladder, and in other ways misusing it which would weaken it.

**Contentions of Claimant, the Union Sulphur and Oil Corporation, as Against Impleaded Respondent W. J. Jones & Son, Inc.**

Claimant contends as follows:

1. Said steamship Herman Frasch was turned over to impleaded respondent as independent contracting stevedores for the purpose of unloading on or about October 1, 1949, and thereafter impleaded respondent was in sole and complete charge of the holds of said steamship.

2. At the time said steamship was turned over to impleaded respondent for unloading, namely on October 1, 1949, said steel ladder from which libellant was precipitated into No. 3 hold was suitable for the use for which it was intended.

3. Impleaded respondent negligently and carelessly misused said steel ladder in the following, among other, particulars:

(a) Impleaded respondent attached drag lines to said ladder and to the uprights and rungs thereof or either of them for the purpose of obtaining favorable leads to its drag which was used for trimming sulphur into the square of the hatch, thereby placing great strains upon said ladder, which strains were far greater than said ladder was designed to withstand.

(b) Impleaded respondent permitted its drag line and other lines to work and chafe along and across the face of said ladder and the uprights thereof, thereby violently shaking said ladder and

placing upon it strains which it was not designed to withstand.

(c) Impleaded respondent carelessly and negligently permitted its heavy clamshell bucket to strike said ladder frequently.

4. As a result of said misuse of said steel ladder the same was damaged and weakened and the joints between the rungs and the uprights thereof were damaged and weakened.

5. The negligent and careless acts of impleaded respondent as alleged in Paragraphs 3 and 7 of these Contentions, together with the negligent and careless acts of libelant as alleged in claimant's contentions as against libelant were the proximate causes of said accident to libelant.

6. No acts or omissions on the part of claimant in any way contributed to said accident to libelant.

7. Impleaded respondent was negligent and careless in that it permitted libelant to descend into No. 3 hold by the ladder which gave way when there was another and safer ladder available at the forward end of said hold protected from damage by heavy ship frames, which impleaded respondent well knew or should have known.

8. Claimant denies the contentions of impleaded respondent except as admitted in the admitted facts or as admitted in claimant's contentions as against impleaded respondent.

#### Contentions of W. J. Jones & Son, Inc.

Respondent W. J. Jones & Son, Inc., a corporation, contends that the injuries sustained by libelant

resulted solely from the unseaworthiness of the steamship Herman Frasch and the negligence of said vessel, her master, officers and owner in the following respects:

1. The ladder in the after part of the No. 3 hold of said vessel was old, rusted, oxidized and worn to such an extent that the rung which pulled out at the time of libelant's fall was attached to the uprights of the ladder by only a small edge of metal.

2. In that the ladder was improperly constructed because the rungs in said ladder were not firmly welded to the uprights and the ends of the rungs had not been champfered.

3. In that the owner, master and officers failed to inspect the said ladder before turning it over to respondent for discharge of the sulphur and in failing to warn respondent and libelant of the defective condition of the ladder.

This respondent denies the contentions of libelant and of claimant except as admitted in the admitted facts or as they coincide with the contentions of this respondent.

#### List of Exhibits of the Union Sulphur and Oil Corporation

1. Two photographs of ladder uprights on SS Herman Frasch.
2. Motion picture film showing stevedores' operation on SS Herman Frasch.
3. Steel Shackle.

4. Stevedore Damage Report, October 12, 1949.
  5. Stevedore Damage Report, October 13, 1949.
  6. Log book.
  7. Earning records of libelant.
- List of Exhibits of W. J. Jones & Son, Inc.
- 8, a, b & c. Two photographs of ladder.
  9. Rung.
  10. Set of X-rays.

Based upon the hearing before this Court and the Court being fully advised in the premises,

It Is Hereby Ordered that the foregoing constitutes the Pre-trial Order in the above-entitled action and that the foregoing Order supersedes the pleadings and said Pre-trial Order shall not be amended in the trial except by consent or by the Order of the Court to prevent manifest injustice.

Dated this 18th day of October, 1950.

/s/ GUS J. SOLOMON,  
Judge.

/s/ PAUL R. HARRIS,  
Proctor for Libelant.

WOOD, MATTHIESSEN &  
WOOD,  
Proctors for Claimant.

/s/ GUNTHER F. KRAUSE,  
Proctors for Impleaded  
Respondent.

[Endorsed]: Filed October 18, 1950.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court October 18, 1950. Libelant appeared in person and by his proctor Mr. Paul R. Harris. Claimant and Petitioner, Union Sulphur and Oil Corporation, successor to The Union Sulphur Company, Inc., appeared by Wood, Matthiessen & Wood and Erskine B. Wood, of its proctors, and Impleaded Respondent W. J. Jones & Son, Inc., appeared by Mr. Gunther F. Krause, of its proctors.

At the outset of the trial the libelant agreed with claimant and petitioner to a compromise settlement of libelant's claims for the sum of \$6110.00. It was stipulated between claimant and petitioner and the impleaded respondent that settlement for the sum of \$6110.00 to be paid to libelant was reasonable as to amount, and that the impleaded respondent had no objection to claimant and petitioner making such settlement, and that such settlement might be made without prejudice to the claim of claimant and petitioner against the impleaded respondent for indemnity or contribution. The case thereafter proceeded to trial upon the remaining issues raised by the claim of claimant and petitioner against W. J. Jones & Son, Inc., the impleaded respondent for indemnity or contribution. Testimony and exhibits on behalf of both parties were received in evidence and the Court having heard and considered the testimony and

having examined and considered the exhibits, and having heard and considered the arguments of counsel, and being advised in the premises, does hereby state its

### Findings of Fact

#### I.

Libelant is a longshoreman by occupation, a resident of the United States and the State of Washington, residing near Camas, Washington. The steamship Herman Frasch is an ocean-going Liberty type vessel owned and operated by Union Sulphur and Oil Corporation, the claimant and petitioner. Claimant and petitioner is a corporation organized under the laws of the State of Delaware, and is the successor to The Union Sulphur Company, Inc. W. J. Jones & Son, Inc., is a corporation organized and existing under the laws of the State of Oregon, and is engaged in the business of stevedoring operations and loading and discharging ships as an independent stevedore contractor.

#### II.

On or about October 13, 1949, the steamship Herman Frasch was lying alongside the dock at Terminal No. 2, Vancouver, Washington, on the navigable waters of the Columbia River. A cargo of bulk sulphur was being discharged from the vessel. W. J. Jones & Son, Inc., the impleaded respondent, was unloading the vessel as independent contracting stevedore. Libelant was working aboard the vessel as a longshoreman in the employ of

W. J. Jones & Son, Inc. W. J. Jones & Son, Inc., had been discharging sulphur from the vessel on the previous day in the harbor of Portland, Oregon.

### III.

On October 13, 1949, libelant, acting under the orders and directions of his employer, the stevedore company, descended into No. 3 lower hold. Libelant was descending into the hold by means of a steel ladder permanently fastened to the after end of the No. 3 hatch. The ladder consisted of two steel uprights with welded steel rungs. At the time libelant was descending into No. 3 hold most of the sulphur cargo in the hold had already been discharged by the impleaded respondent stevedore company and the sulphur was only a few feet deep at the bottom of the hold. When libelant was part way down the ladder one of the rungs of the ladder gave way and he fell approximately 15 feet into the hold, resulting in serious injuries.

### IV.

The Court finds that the weld by which the steel rung was welded to the vertical uprights of the ladder was defective. However, prior to the day of the accident the weld, although defective, had supported many men who had used the ladder for climbing in and out of the hold, and the Court finds that at the time the vessel was turned over to the stevedore company for the purpose of discharging the cargo the weld was sufficiently strong to support

men heavier than libelant climbing up and down and using the ladder, and that the ladder could have been used by men climbing up and down it, and the accident would not have occurred except for a further weakening of the ladder caused by the impleaded respondent as hereinafter set forth.

## V.

The Court finds that prior to the accident the impleaded respondent stevedore company, in connection with the discharging of the sulphur, had used a clamshell bucket and had also used a drag to drag the sulphur from the wings and trunks of the hatch into the square of the hatch and had used wire cables known as drag lines for the purpose of pulling the drag into the square of the hatch, and had also used drag lines and blocks for the purpose of obtaining favorable leads to the drag. The Court finds that the impleaded respondent stevedore company had, prior to the accident, used the ladder for obtaining leads to its drag lines. This placed heavy and excessive strains upon the ladder at and near the point where the rung gave way and also caused it to shake and vibrate excessively and caused the ladder to be further weakened and loosened at said point. The ladder, which was part of the permanent structure of the vessel, was not designed or intended to be subjected to the heavy and excessive strains which were placed upon it by impleaded respondent stevedore company. It was not good stevedoring practice for the stevedore

company to use the ladder for this purpose and to subject it to heavy and excessive strain and vibration by means of its drag lines.

## VI.

The Court finds that the accident and libelant's injuries were proximately caused by the defective weld by which the rung was welded to the uprights of the ladder, combined with the further weakening and loosening of the rung resulting from the stevedore company's improper use of the ladder. The Court finds that the vessel was unseaworthy in that the weld of the rung to the uprights of the ladder was defective, but that this unseaworthiness would not itself have caused the accident except for the joint and concurring negligence of the impleaded respondent stevedore company in causing the rung to be further weakened and loosened.

## VII.

The Court finds that libelant's injuries were proximately caused by the joint and concurring negligence of the vessel Herman Frasch and of the impleaded respondent, W. J. Jones & Son, Inc.

Based upon the foregoing Findings of Fact, the Court makes the following

### Conclusions of Law

1. The respondent vessel Herman Frasch was liable to libelant for the full amount of his damages.
2. The amount paid by claimant and petitioner Union Sulphur and Oil Corporation to libelant in

full settlement of libelant's claims was not in excess of a reasonable amount for libelant's damages.

3. Libelant's injuries proximately resulted from the joint and concurring negligence of the ship (and its owners, claimant and petitioner) and the impleaded respondent W. J. Jones & Son, Inc.

4. Although libelant's injuries were proximately caused by the joint and concurring negligence of the ship and the impleaded respondent, claimant and petitioner's demand for indemnity or contribution over and against the impleaded respondent should be denied upon authority of American Mut. Liability Ins. Co. vs. Mathews, 182 F. 2d 332, 2 Cir., and in conformity with Johnson vs. U. S., 79 F. Supp. 448 (1948).

5. The claims of the libelant have already been fully discharged and satisfied by claimant and petitioner through payment of \$6110.00 in compromise settlement. The impleaded respondent W. J. Jones & Son, Inc., is entitled to a decree dismissing the claim of claimant and petitioner for contribution or indemnity, and the impleading petition should be dismissed with prejudice and without costs to any of the parties.

Dated this 15th day of March, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed March 15, 1951.

In the United States District Court  
for the District of Oregon

Civil No. 5200

ALLAN MARSHALL,

Libelant,

vs.

STEAMSHIP "HERMAN FRASCH," Her Boil-  
ers, Engines, Tackle, Apparel and Furniture,  
Respondent,

UNION SULPHUR AND OIL CORPORATION,  
a Corporation,

Claimant and Petitioner,

vs.

W. J. JONES & SON, INC., a Corporation,  
Impleaded Respondent.

## DECREE

This case came on for trial before the court on October 18, 1950. Libelant appeared in person and by his proctor, Mr. Paul R. Harris. Claimant and petitioner, Union Sulphur and Oil Corporation, successor to The Union Sulphur Company, Inc., appeared by Wood, Matthiessen & Wood and Erskine B. Wood, of its proctors; and impleaded respondent, W. J. Jones & Son, Inc., appeared by Mr. Gunther F. Krause, of its proctors.

At the outset of the trial the libelant agreed with claimant and petitioner to a compromise settlement

of libelant's claims for the sum of \$6,110.00. It was stipulated between claimant and petitioner and the impleaded respondent that settlement for the sum of \$6,110.00 to be paid to libelant was reasonable as to amount, and that the impleaded respondent had no objection to claimant and petitioner making such settlement, and that such settlement might be made without prejudice to the claim of claimant and petitioner against the impleaded respondent for indemnity or contribution. The case thereafter proceeded to trial upon the remaining issues raised by the claim of claimant and petitioner against W. J. Jones & Son, Inc., the impleaded respondent for indemnity or contribution. Testimony and exhibits on behalf of both parties were received in evidence and the court having heard and considered the testimony and having examined and considered the exhibits, and having heard and considered the arguments of counsel, and being advised in the premises and having made and filed its Findings of Fact and Conclusions of Law,

It is now here Ordered and Decreed:

1. That the respondent vessel "Herman Frasch" was liable to libelant for the full amount of his damages and that the amount paid by claimant and petitioner Union Sulphur and Oil Corporation to libelant in full settlement of libelant's claims was not in excess of a reasonable amount for the injuries and damages sustained by libelant.
2. That the libel be and it hereby is dismissed as to respondent steamship "Herman Frasch," the

claimant and petitioner Union Sulphur and Oil Corporation, and the impleaded respondent W. J. Jones & Son, Inc., without costs to any of the parties.

3. That the petition of Union Sulphur and Oil Corporation against W. J. Jones & Son, Inc., be and the same hereby is dismissed without costs to either party.

Dated this 16th day of March, 1951.

/s/ GUS J. SOLOMON,  
Judge.

Service by copy acknowledged.

[Endorsed]: Filed March 16, 1951.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To W. J. Jones & Son, Inc., a corporation, Impleaded Respondent, and Gunther F. Krause, its proctor:

Notice is hereby given that claimant and petitioner, Union Sulphur and Oil Corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree entered herein on the 16th day of March, 1951, by which decree claimant and petitioner was denied recovery against impleaded respondent by way of indemnity or contribution to the sum of \$6,110.00 paid by

claimant and petitioner in full settlement of the claims of libelant. On this appeal, the appellant does not seek any review of the facts as found by the trial court, but desires only a review of the question whether, on the facts as found by the trial court, appellant is entitled to indemnity or contribution from and against impleaded respondent.

Dated this 27th day of April, 1951.

WOOD, MATTHIESSEN &  
WOOD,

/s/ ERSKINE B. WOOD,

Proctors for Union Sulphur and Oil Corporation,  
Claimant and Petitioner.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of District Court and Cause.]

**PETITION FOR APPEAL**

Comes now Union Sulphur and Oil Corporation, claimant and petitioner herein, and prays that it may be allowed to appeal from the final decree entered in this Court and cause on the 16th day of March, 1951, to the United States Court of Appeals for the Ninth Circuit, on the grounds and for the reasons of error of law as set forth in the Assignments of Error herein filed; on this appeal petitioner does not desire a review of the facts as

found by the trial court, but desires only a review of the question of law whether, on the facts as found by the trial court, appellant is entitled to indemnity or contribution from and against impleaded respondent. Your petitioner prays that no additional appeal bond be required since petitioner has already on April 25, 1950, filed a surety company cost bond in the amount of \$250.00, which covers all costs and expenses that might be awarded in case of appeal by the appellate court, and said bond is still in full force and effect. Petitioner prays that this appeal be allowed and that the usual citation on appeal be issued to W. J. Jones & Son, Inc., impleaded respondent, and to its proctor.

Dated this 27th day of April, 1951.

WOOD, MATTHIESSEN &  
WOOD,

/s/ ERSKINE B. WOOD,  
Proctors for Union Sulphur and Oil Corporation,  
Claimant and Petitioner.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of District Court and Cause.]

#### ORDER ALLOWING APPEAL

Upon the petition of Union Sulphur and Oil Corporation, claimant and petitioner, and it ap-

pearing to the Court that said petitioner has a right of review upon appeal for claimed errors of law,

It Is Hereby Ordered that the appeal herein be allowed as prayed for to the United States Court of Appeals for the Ninth Circuit, and that no additional appeal bond be required.

Dated this 30th day of April, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed April 30, 1951.

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[Title of District Court and Cause.]

### ASSIGNMENTS OF ERROR

Union Sulphur and Oil Corporation, claimant and petitioner herein, appealing from the final decree entered in this Court and cause on March 16, 1951, makes and sets out the following Assignments of Error:

#### I.

The trial court erred in denying claimant and petitioner recovery from and against impleaded respondent, W. J. Jones & Son, Inc., by way of indemnity or contribution for the amount paid by claimant and petitioner to libelant in settlement of libelant's claims.

#### II.

The trial court erred in ruling as a matter of law,

that on the facts as found by the trial court claimant and petitioner was not entitled to recovery against impleaded respondent, W. J. Jones & Son, Inc.

### III.

The trial court erred in ruling as a matter of law, although the impleaded respondent was guilty of joint and concurrent negligence which proximately contributed to libelant's injuries, claimant and petitioner was not entitled to indemnity or contribution over and against impleaded respondent.

### IV.

Claimant and petitioner does not allege any error with respect to the trial court's findings of fact but claims that the court erred in failing to allow claimant and petitioner's demand for indemnity or contribution from and against impleaded respondent on the basis of the facts as found by the trial court.

WOOD, MATTHIESSEN &  
WOOD,

/s/ ERSKINE B. WOOD,  
Proctors for Union Sulphur and Oil Corporation,  
Claimant and Petitioner.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

[Title of District Court and Cause.]

### CITATION ON APPEAL

To W. J. Jones & Son, Inc., Impleaded Respondent,  
and Mr. Gunther F. Krause, its proctor,

Greeting:

Whereas, Union Sulphur and Oil Corporation, claimant and petitioner in that certain cause in that certain cause in this Court entitled: "Allan Marshall, Libelant, vs. Steamship 'Herman Frasch,' her boilers, engines, tackle, apparel and furniture, Respondent, Union Sulphur and Oil Corporation, a corporation, Claimant and Petitioner, vs. W. J. Jones & Son, Inc., a corporation, Impleaded Respondent, Civil No. 5200," has lately appealed to the United States Court of Appeals for the Ninth Circuit from the final decree rendered in said cause in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You Are Therefore Hereby Cited and Admonished to be and appear before said United States Court of Appeals for the Ninth Circuit, at San Francisco, California, within forty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said Dis-

trict, this 30th day of April, in the year of our Lord, one thousand nine hundred and fifty-one.

/s/ GUS J. SOLOMON,  
Judge.

Service of copy acknowledged.

[Endorsed]: Filed April 30, 1951.

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[Title of District Court and Cause.]

### DOCKET ENTRIES

#### 1949

Dec. 22—Filed libel in rem.

Dec. 22—Filed stipulation for costs.

Dec. 22—Issued warrant of arrest—to marshal.

Dec. 23—Filed bond by claimant.

Dec. 23—Filed claim by owner.

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Feb. 2—Filed stipulation as to time in which claimant may file answer, etc.

Apr. 25—Filed answer of claimant.

Apr. 25—Filed petition to bring in W. J. Jones & Son, Inc., as 3rd party under Rule 56.

Apr. 25—Filed cost bond of claimant.

Apr. 25—Issued monition for W. J. Jones & Son under Rule 56—to marshal.

Apr. 27—Filed monition with return.

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- May 12—Filed libelant's answer to petition of claimant to bring in W. J. Jones & Son, etc.
- May 22—Filed exceptions to petition to bring in W. J. Jones & Son as 3rd party respondent.
- June 5—Filed substitution of proctors.
- June 5—Filed and entered order substituting Krause, Evans & Korn as proctors for W. J. Jones & Son. Fee.
- June 5—Record of hearing on exceptions to petition to bring in 3rd party respondent. Fee.
- June 26—Record of opinion. Fee.
- June 26—Filed option.
- Aug. 28—Record of pre-trial conference and order entered assigning to J. McColloch. Fee.
- Sept. 5—Entered order assigning to Judge Solomon. McC.
- Sept. 11—Entered order setting for pre-trial conference Oct. 9 and for trial Oct. 17, 1950. Sol.
- Sept. 21—Filed warrant of arrest returned unexecuted.
- Oct. 9—Record of pre-trial conference and order setting for trial Wed. Oct. 18, 1950. S.
- Oct. 12—Record of pre-trial conference. S.
- Oct. 16—Issued subpoena and 1 copy to atty. Dressler.
- Oct. 18—Filed answer of W. J. Jones & Son to petition of claimant.
- Oct. 18—Filed answer of resp. W. J. Jones & Son to the libel.
- Oct. 18—Filed and entered pre-trial order. S.

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- Oct. 18—Record of trial before court and cont'd to  
Oct. 19, 1950. S.
- Oct. 19—Record of trial—submitted. S.
- Oct. 24—Filed letter citing authorities by claimant.
- Nov. 18—Filed exoneration of libelant's bond by  
claimant.
- Dec. 15—Filed and entered order discharging  
claimant's bond. S.

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- Feb. 12—Record of oral opinion. S.
- Feb. 14—Filed exhibits.
- Mar. 15—Filed and entered Findings of Fact and  
Conclusions of Law. S.
- Mar. 16—Filed and entered Decree. S.
- Apr. 30—Filed notice of appeal by Union Sulphur  
and Oil Corporation.
- Apr. 30—Filed petition for appeal.
- Apr. 30—Filed and entered order allowing appeal. S.
- Apr. 30—Filed citation on appeal.
- Apr. 30—Filed assignments of error.
- Apr. 30—Filed designation of apostles.

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CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States  
District Court for the District of Oregon, do hereby  
certify that the foregoing documents consisting of

Pre-Trial Order, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal, Petition for Appeal, Order Allowing Appeal, Assignments of Error, Citation on Appeal, Designation of Apostles on Appeal, Transcript of Docket Entries, and Clerk's Certificate, constitute the record on appeal from a decree of said court in a cause therein numbered Civil 5200, in which the Union Sulphur and Oil Corporation is claimant and petitioner and appellant, and W. J. Jones & Son, Inc., is respondent and appellant; that the said record has been prepared by me in accordance with the designation of apostles on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of May, 1951.

[Seal]

LOWELL MUNDORFF,  
Clerk,

By /s/ F. L. BUCK,  
Chief Deputy.

---

[Endorsed]: No. 12938. United States Court of Appeals for the Ninth Circuit. Union Sulphur and Oil Corporation, a corporation, Appellant, vs. W. J. Jones & Son, Inc., a corporation, Appellee. Apostles

on Appeal. Appeal from the United States District Court for the District of Oregon.

Filed May 18, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 12938

UNION SULPHUR AND OIL CORPORATION,  
Appellant,

vs.

W. J. JONES & SON, INC.,

Appellee.

STATEMENT OF POINTS ON APPEAL AND  
DESIGNATION OF RECORD

Appellant states the Points relied upon on appeal as follows:

1. The trial court, having found as a fact that appellee was negligent and that such negligence proximately caused and contributed to libelant's injuries, and that libelant would not have been injured except for appellee's negligence, should have granted appellant full recovery against appellee by way of indemnity.

2. The trial court found as a fact that appellee negligently subjected the ladder on appellant's vessel to improper use, and that this negligence caused and contributed to libelant's injuries, and that libelant would not have been injured except for such negligence on the part of appellee. On these facts appellant is entitled to full recovery against appellee by way of indemnity.

3. On the facts as found by the trial court, appellant is entitled to full recovery over and against appellee of the amount paid to libelant, by way of full indemnity and under the decision of this Court in U. S. v. Rothschild Stevedoring Co., 1950 A.M.C. 1332, 183 F. 2d 181.

4. On the facts as found by the trial court, if appellant should not be entitled to full indemnity, then in the alternative, appellant is at least entitled to contribution from and against appellee.

Appellant designates the portions of the record material to the consideration of the appeal as follows:

1. The pre-trial order.
2. The Court's findings of fact and conclusions of law made and entered in the trial court the 15th day of March, 1951.
3. The final decree made and entered March 16, 1951.
4. Notice of appeal.
5. Petition for Appeal.

6. Order Allowing Appeal.
7. Assignments of Error.
8. Citation on Appeal.

WOOD, MATTHIESSEN &  
WOOD,  
/s/ ERSKINE B. WOOD,  
Proctors for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed May 28, 1951.

United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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UNION SULPHUR AND OIL CORPORATION,  
a Corporation,

*Appellant,*

vs.

W. J. JONES & SON, INC., a Corporation,

*Appellee.*

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**BRIEF OF APPELLANT**  
**UNION SULPHUR AND OIL CORPORATION**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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KRAUSE, EVANS & KORN,  
GUNTHER F. KRAUSE,

Spalding Building,  
Portland, Oregon,

*Proctor for Appellee.*

WOOD, MATTHIESSEN & WOOD,  
ERSKINE B. WOOD,

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*Proctors for Appellant.*



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**United States  
COURT OF APPEALS  
for the Ninth Circuit**

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**UNION SULPHUR AND OIL CORPORATION,  
a Corporation,**

*Appellant,*

vs.

**W. J. JONES & SON, INC., a Corporation,**

*Appellee.*

---

**BRIEF OF APPELLANT  
UNION SULPHUR AND OIL CORPORATION**

---

Upon Appeal from the District Court of the United  
States for the District of Oregon.

---

**JURISDICTION**

This is an appeal from a final decree entered by the  
District Court in a cause in admiralty. Therefore this  
Court has jurisdiction of the appeal.

## STATEMENT OF THE CASE

This case involves the right of a shipowner to recover from a stevedore company employer, by way of indemnity or contribution, amounts which the shipowner has had to pay to an injured longshoreman. The appeal is based upon an acceptance of the trial court's findings of fact, and only a question of law is involved.

Allan Marshall, a longshoreman working in the employ of W. J. Jones & Son, Inc., the Appellee, was injured aboard the S.S. HERMAN FRASCH, a vessel owned and operated by the Appellant, Union Sulphur and Oil Corporation. Marshall filed a libel in rem against the vessel. Appellant, as shipowner and claimant, impleaded Appellee, the stevedore company, for full indemnity or contribution for any amount that Appellant might have to pay the injured longshoreman. At the outset of the trial in the District Court, and with the consent of Appellee, Appellant settled libelant's claims for \$6,110. The case proceeded to trial upon the sole issue of Appellant's right to indemnity or contribution from Appellee.

The facts are fully and accurately set forth in the trial court's Findings of Fact (Apostles 14-18), and indeed this appeal is taken upon the Findings of Fact and Conclusions of Law alone. Therefore, Appellant adopts the Findings of Fact as set forth in the Apostles, pages 14 to 18, as the statement of the case.

The trial court found that the vessel's ladder was unseaworthy, due to a defective weld. The trial court

also found that Appellee, the stevedore company, was negligent in using the ladder for purposes it was not designed or intended for, and placing excessive strains upon it which further weakened it. The ladder, although having a poor weld, was sufficiently strong to be used as a ladder and could have safely supported men climbing up and down, including Marshall, except for the further weakening caused by Appellee's negligence. Therefore the unseaworthiness would not have caused the accident but for the subsequent negligence and improper use of the ladder by the Appellee (Findings of Fact IV, V, and VI, Ap. 16-18).

On these facts the trial court concluded that the longshoreman's injuries were caused by joint and concurrent negligence of Appellant and Appellee (Conclusions 3, 4, Ap. 19). But the trial court denied Appellant's claim for indemnity or contribution from Appellee.

This appeal therefore presents the question whether a shipowner is entitled to indemnity or contribution against a stevedore company which improperly and negligently misuses the ship's equipment, which although defective could have been safely used for the purpose intended except for the subsequent active negligence of the stevedore.

## **POINTS ON APPEAL ASSIGNMENTS OF ERROR**

Appellant's Assignments of Error and Points on Appeal are set forth in the Apostles pages 25, 26 and 32, 33. In essence, the Assignments of Error and Points on Appeal are to the effect that, upon the facts as found by the trial court, the court should have granted Appellant full indemnity against Appellee, or in the alternative, at least contribution. As the Assignments and Points are somewhat repetitious, for the convenience of the Court we do not set them all out here, but include them all in the Appendix to this brief. And we ask that we be permitted to discuss them all under the headings of numbers 3 and 4 of the Points on Appeal.

### **I.**

**On the facts as found by the trial court, Appellant is entitled to full recovery over and against Appellee of the amount paid to libelant, by way of full indemnity and under the decision of this Court in U. S. v. Rothschild Stevedoring Co., 150 A.M.C. 1332, 183 F. 2d 181.**

## **ARGUMENT**

We believe that under the decision of this Court in *U. S. v. Rothschild Stevedoring Co.*, 1950 A.M.C. 1332, 183 F. 2d 181, appellant is entitled to full indemnity from appellee.

In the Rothschild case both the shipowner (the United States) and the stevedore company (Rothschild) were negligent (183 F. 2d at p. 182). The vessel furnished a defective winch, and for this the shipowner was held liable to the injured longshoreman. The stevedore company was negligent in using the winch after it was known to be defective. The stevedore's negligence was subsequent in time to that of the shipowner. This Court quoted the following from *The Mars*, 9 F. 2d 183, 184:

"It may be thought that this was a proper case for dividing damages. I think not. \* \* \* I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

This Court granted the shipowner full indemnity over against the Rothschild Stevedoring Company.

The present case is very close upon the facts to the Rothschild case, and in some respects is an even stronger case for the shipowner. In both cases the vessel had defective equipment. In both cases the defective equipment alone would not have caused the injury. In both cases the stevedore's negligence, subsequent in time, brought about the accident.

However, in the Rothschild case we understand the winch was defective and absolutely unsafe for the pur-

pose intended. In the present case, while the ladder had a defective weld, nevertheless when the vessel was turned over to the stevedore company the ladder "was sufficiently strong to support men heavier than libelant climbing up and down and using the ladder, and that the ladder could have been used by men climbing up and down it, and the accident would not have occurred except for a further weakening of the ladder caused by the impleaded respondent as hereinafter set forth" (Finding IV, Ap. 16, 17). This seems to make the present case an even stronger one for the shipowner than the Rothschild case.

Furthermore, in the Rothschild case the negligence of the stevedore company consisted of using the defective ship's appliance for the purpose intended. That is, they used the winch as a winch. But in the present case the stevedore company's negligence consisted of using the ladder to obtain leads to the drag lines. This was an entirely improper use of the ladder which put heavy and excessive strains upon it and weakened it (Finding V, Ap. 17). Therefore the stevedore was guilty of even more serious negligence here than in the Rothschild case.

We submit that here, as in the Rothschild case, and in *The Mars*, appellant's negligence was merely a pre-existing condition, and the subsequent active negligence of appellee should be considered the real proximate cause of the accident.

It is true that the trial court made "Findings" that the negligence of appellant and appellee was "joint and concurrent". However, while stated under the "Find-

ings", this is really a conclusion of law drawn from the basic facts. Therefore this Court is free to determine for itself whether the negligence of both parties is joint and concurrent, or whether the subsequent negligence of appellee is the real proximate cause. See *Barbarino v. Stanhope SS Co.*, 151 F. 2d 553; *Bonnewell v. U. S.*, 170 F. 2d 411.

Here the ladder furnished by the ship, if used as a ladder, was sufficiently strong and could have been used safely and would have caused no injury. The subsequent and active negligence of appellee in subjecting the ladder to improper use brought about the accident. We submit that the shipowner should recover full indemnity under these circumstances.

## II.

**On the facts as found by the trial court, if Appellant should not be entitled to full indemnity, then in the alternative, Appellant is at least entitled to Contribution from and against Appellee.**

## ARGUMENT

Both the ship and the stevedore company were negligent. If appellant is denied full indemnity, then appellant is entitled at least to contribution to the extent of one half the amount it has had to pay the injured longshoreman.

The usual rule in admiralty, where two parties are negligent, is that each shall pay one half of the damages.

Following this, where an employee of a stevedore or ship repair firm is injured aboard ship through the negligence of both the ship and the employer, the weight of authority has allowed the shipowner contribution against the stevedore or ship repair firm to the extent of one half the damages paid by the shipowner to the injured man.

*Barbarino v. Stanhope SS Co.* (CCA 2d), 151 F. 2d 553.

*Lascovitch v. S.S. SAMOVAR* (N.D. Calif.), 1947 A.M.C. 1046; 72 F. Supp. 574.

*Coal Operators Gas Co. v. U. S.* (E.D. Penn.), 1948 A.M.C. 127; 76 F. Supp. 681.

*Christon v. U. S.* (E.D. Penn.), 1948 A.M.C. 953.

*Calvino v. Pan Atlantic SS Corp.* (S.D.N.Y.), 1940 A.M.C. 289; 29 F. Supp. 1022.

*Severn v. U. S.* (S.D.N.Y.), 1946 A.M.C. 1468; 69 F. Supp. 21.

*Green v. W. S. A.* (E.D.N.Y.), 1946 A.M.C. 874; 66 F. Supp. 393.

*Brosnan v. A. P. L.* (S.D.N.Y.), 1943 A.M.C. 526.

*The Tampico* (W.D.N.Y.), 1942 A.M.C. 955; 45 F. Supp. 174.

*Rederii v. Jarka Corp.* (D. of Maine), 1939 A.M.C. 476; 26 F. Supp. 304.

cf. *Portel v. U. S.* (S.D.N.Y.), 1949 A.M.C. 487; 85 F. Supp. 458 (Contribution of 60% allowed).

And see *American Stevedores v. Porello* (U.S. Sup. Ct. 1947), 330 U.S. 446; 91 L. Ed. 1011.

And cf. *Westchester Lighting Co. v. Westchester Estates*, 278 N.Y. 175; 15 N.E. 2d 567.

In passing upon this question, the courts have had to consider the effect of the Longshoremen's and Harbor Workers' Act, 33 U.S. Code § 901 et seq. It has been contended that section 5 of the Act, making the employer's liability for compensation exclusive of any other liability to the employee, precluded the shipowner from recovery over against the stevedore for contribution. But the Act was never intended to affect the rights between the employer and third parties such as the shipowner. Therefore the courts generally have rejected this contention. In doing so, the courts have drawn on the clear analogy of *The Chattahoochee*, 173 U.S. 540; where the Supreme Court held that the Harter Act, although precluding a direct recovery by cargo against the carrying vessel, does not preclude the non-carrying vessel recovering over against the carrying vessel one half of the damages which the non-carrying vessel has had to pay cargo.

Holding the Longshoremen's Act is no defense to the shipowner's claim for contribution, Judge Peters said, in *Rederii v. Jarka Corp*, supra:

"The respondent contends that by the terms of the Act its liability for damages on account of an injury is limited to a person proceeding under the Act, and that as this libel is an action for or on account of the injury it cannot be sustained for that reason.

"The language of the Act is not appropriate to the meaning respondent argues for. The liability excluded by the language is other liability of the employer to the employee, or anyone standing in his shoes, for damages 'on account of such injuries'.

"This is an action by one, not to recover damages for or on account of the accident, but to recover damages that he had to pay the injured person or on account of the accident to him.

"It is alleged to be a case of joint tort feasors, one having paid damages seeking indemnity or contribution from the other.

"If the longshoreman's right of action against the vessel was not taken away by the Act he can libel the vessel as before, and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.

"A case very much in point is Westchester Lighting Company vs. Westchester County Small Estates Corporation, 278 N.Y. 175, 15 N.E. (2d) 567. This case arose under the New York statute which has language nearly identical in this matter with the Federal statute." 1939 A.M.C. at pp. 477, 478; 26 F. Supp. at p. 305.

Likewise, in *The Samovar*, supra, Judge Mathes said:

" . . . the Longshoremen's and Harbor Workers' Compensation Act alters only the liability of the employer to the employee . . . and does not affect the conventional relationship between the employer and other tort-feasors.

\* \* \* \* \*

"If, by reason of limitation of liability or other statutory immunity, a libellant cannot recover directly from one of two joint tort-feasors, he may proceed against one for the full amount of his damages, and the latter would have a right of contribution for one half from the other tort-feasor (*Aktieselskabet Cuzco* vs. *The Sucarseco*, 294 U.S. at 400, 401, 1935 A.M.C. 412; *The Chattahoochee*, 173 U.S. at 540)," 1947 A.M.C. at 1064, 1065; 72 F. Supp. at 588, 589.

Similarly, nearly all of the other cases cited above, which allow the right of contribution, have stated that the Longshoremen's Act does not give the stevedore immunity from suit by the shipowner.

## DISCUSSION OF CASES CITED BY TRIAL COURT

The trial court denied indemnity or contribution "upon authority of *American Mutual Liability Ins. Co. v. Mathews*, 182 F. 2d 322, 2 Cir., and in conformity with *Johnson v. U. S.*, 79 F. Supp. 448 (1948)" (Ap. 19). We shall therefore discuss these cases.

*Johnson v. U. S.* was a decision of the District Court for Oregon, by Judge McColloch, which Judge Solomon was bound to conform to as a prior decision of the same court.

In Judge McColloch's brief opinion in the *Johnson* case, he refers to the development of compensation acts to relieve the injustice to injured workmen and their dependents who formerly were left to common law legal remedies. And he seems to feel that allowing the shipowner to sue the stevedore would "open a hole in a dike" and endanger the system of compensation acts.

But the shipowner's right to contribution against the stevedore employer has no effect whatever on the employee's right to compensation if he elects to receive it. The compensation acts are well established in our system. Their primary purpose was to afford greater rem-

edies to the workmen. But they were not intended to give the employer an immunity from suit by third parties.

We do not think it can be of benefit to the injured workmen to let the stevedore-employer escape entirely free in these cases where the employer has been guilty of negligence contributing to the injury.

The Johnson case is against the great weight of authority of many cases which have held that the Longshoremen's Act does not give the stevedore immunity from contribution. At the time the Johnson case was decided, it was supported only by dictum, without discussion, in *Frusteri v. U. S.*, 76 F. Supp. 667 (E.D.N.Y. 1947).

Subsequently, even this dictum was destroyed as authority by the decision of the Court of Appeals for that Circuit in *Rich v. United States* (Second Circuit), 177 F. 2d 688; 1949 A.M.C. 2079, where it was expressly held that the Longshoremen's Act does not preclude the shipowner from recovering over against the injured man's employer.

We also point out that the Johnson case has in effect been overruled by this court's decision in *U. S. A. v. Rothschild Stevedoring Co.*, 1950 A.M.C. 1332; 183 F. 2d 181. For in that case this court allowed the shipowner to recover full indemnity against the stevedore employer, notwithstanding the Longshoremen's Act. If the Longshoremen's Act does not give the stevedore immunity from full indemnity, then surely it does not give immunity from contribution.

The other case cited by the trial court is *American Mutual Liability Ins. Co. v. Matthews*, a decision of the Second Circuit, 182 F. 2d 322; 1950 A.M.C. 1272. We wish to discuss the Matthews case from two separate points of view. First, we say it is wrong, and does not represent the law of this Circuit. Second, we say it is clearly distinguishable from the present case, and in fact supports the right to contribution under the facts of the present case.

#### FIRST — MATTHEWS CASE WRONG

In the Matthews case a longshoreman was injured aboard ship through the breaking of a defective guy rope. The ship was negligent in furnishing the defective rope. The stevedore company was negligent in not inspecting the rope before using it. The trial court had allowed the shipowner (and its insurer suing under right of subrogation) contribution against the stevedore employer of one half the amount that the shipowner had to pay the injured man. The Court of Appeals reversed, denying any right of contribution under the facts of the case.

The opinion goes upon a strict technical analysis of the right of contribution between joint tort-feasors. It says there can be no contribution between joint tort-feasors unless there is a common liability, and says that because of the Longshoremen's Act there is no tort liability of the stevedore to the injured employee, and hence no liability in common with the ship.

This restriction of the right of contribution on strict

technical grounds, against the previous great weight of authority, has been criticized and rejected in a recent decision by the Third Circuit.

*Baccile v. Halcyon Lines* (Third Circuit 1951), 1951 A.M.C. 542; 187 F. 2d 403.\*

In this decision the Third Circuit points out that such a strict and technical application is not in keeping with the admiralty law, where the right of contribution between wrongdoers has been so long recognized as a rule of fairness.

" . . . literal adherence to concepts derived from the common law would not seem appropriate in a system of jurisprudence that has developed rules according to its own sense of right, even contrary to those of the common law. The admiralty law early recognized that contributory negligence was not necessarily a bar to recovery, and it devised the 'moiety rule' to satisfy a singular desire 'for a better distribution of justice between mutual wrongdoers.' And where comparative negligence is said to be 'not unknown', the requirement of common liability cannot be deeply ingrained, for the equity of the one is inconsistent with the concept of liability

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\*Note—In this case the Third Circuit adopted the novel device of allowing the right of contribution, limited however to the amount that the employer would have had to pay as compensation. The difficulty here is that this amount would usually be in controversy. The judge or jury may have to arrive at two figures of compensation under different standards in the same trial—namely the injured man's damages for negligence, and, for purpose of contribution, the amount he would have received as compensation. In law actions before a jury this could lead to considerable confusion. Another objection is that the amount of compensation is usually determined administratively, by a deputy commissioner under the Act, but, as the injured man has elected to sue, there is nothing before the deputy commissioner. In some cases the amount of compensation under the Act might be far in excess of half the damages awarded for negligence, in other cases less than half. Where the amount of compensation is in excess of half the damages, the employer would bear more than half the damages, although the ship was equally negligent. We submit that the usual rule of allowing contribution of one half is fair to both parties and far more practical.

in solido attaching to the other." 1951 A.M.C. at pp. 544, 545; 187 F. 2d at 404, 405.

The Matthews case is also criticized in a comment "Contribution in Admiralty Restricted", December 1950 Stanford Law Review, Vol. 3, page 137.

"On the majority's approach the case was closed. The shipowner was denied relief since the situation failed to fit any of the existing categories of recovery over. The result is a logical but unfortunate by-product of a statute with an entirely different purpose. True, the shipowner and the employer are no longer under a common liability in the strict sense, but they are both under a liability for the same injury. And, in effect, the shipowner has discharged the employer's liability to pay compensation, since the employee cannot have both recoveries. The element of fault on both sides is also present. Allowing contribution between wrongdoers is nothing more than a recognition of simple fairness. For a court to deny recovery over unless there is 'common liability' may be a wooden application of the rule in a new and different situation." 1950 Stanford Law Review, Vol. 3, p. 140.

As pointed out in this article and in the Baccile case (*supra*) it is not fitting for the admiralty law to deny the right of contribution on such strict technical grounds. Where the shipowner and stevedore are both negligent, they are both mutual wrongdoers. Each should pay a share of the damages, in accordance with usual admiralty principles. It is manifestly unfair to place the entire loss on the shipowner, and relieve the stevedore company, whose negligence has contributed to the accident, from paying any part of the loss.

The Matthews case is also contrary to the decision of this court in the Rothschild case, and therefore does not represent the law for this Circuit. No better authority for this statement can be cited than the Court which decided the Matthews case. See *Slattery v. Marra Bros.* (2 Cir. 1951), 1951 A.M.C. 183; 186 F. 2d 134.

After referring to its decision in the Matthews case, the Second Circuit says:

"The decision of the Ninth Circuit in *United States v. Rothschild International Stevedoring Co.*, 1950 A.M.C. 1332, 183 F. 2d 181, can indeed hardly be reconciled with ours, for we can see no more reason to hold that it was a breach of the stevedore's contract with the ship to use a winch known to be defective than to use a defective stay." 1951 A.M.C. at p. 190; 186 F. 2d at 139.

The United States Supreme Court has never directly passed upon the point involved, but it touched very closely on the question in *American Stevedores v. Porcello* (1947), 330 U.S. 446; 91 L. Ed. 1011.

That case involved the construction of an ambiguous written contract of indemnity between the shipowner and the stevedore. But in discussing the various possible interpretations, the Supreme Court referred to the "usual rule in admiralty" as requiring each joint tort-feasor to pay a moiety of the damages. And the court then said that if the written contract did not apply to the case, then the district court "would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law" (330 U.S. p. 458; 91 L. Ed. pp. 1020, 1021). It seems clear from the

context that in referring to "applicable rules of admiralty law" the Supreme Court was referring to its preceding statement that the usual rule in admiralty is for each joint tort-feasor to pay a moiety of the damages.

Now the Supreme Court had before it a case where the longshoreman had been injured by negligence of both the shipowner and the stevedore employer. The shipowner was seeking indemnity from the stevedore under a contract. But the Supreme Court said that if the contract was inapplicable, then the district judge should fix the responsibility between the two "under applicable rules of admiralty law," referring to the rule of division of the damages.

This was not dictum, for the Supreme Court was sending the case back with instructions to apply the principles announced.

Therefore we believe this decision actually states that if the shipowner and stevedore are jointly negligent, and no contract is applicable, the stevedore is liable for a moiety of the amount that the shipowner is required to pay the stevedore's employee.

The point we make here has been perhaps more clearly stated by Judge Kirkpatrick in *Coal Operators Gas Co. v. U. S.* (E.D. Penn. 1947), 1948 A.M.C. 127; 76 F. Supp. 681. Although somewhat long, we quote from that opinion:

"A more serious objection is that stated in the opinion of the Circuit Court of Appeals in *Porello v. United States*, 2 Cir., 153 F. 2d 605, 607, as follows: 'For a right of contribution to accrue between tort-

feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution, § 86; 13 Am. Jur., Contribution, § 51. Since the libellant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay.' The Porello case, however, was appealed and the Supreme Court opinion, 330 U.S. 446, 67 S. Ct. 847, 854, contains one statement which I cannot read in any other way than as overruling the position taken by the Circuit Court of Appeals upon this point. Justice Reed was discussing the effect of a contract of indemnity between the employer and the shipowner, and said that on the record the contract was ambiguous and, for that reason, the Supreme Court ruled that the case should go back to the District Court for an interpretation. The Supreme Court suggested that one possibility was that the District Court might find that the contract of indemnity had to do only with a case where the employer's negligence was the sole cause of the injury, in which event it would have no bearing on the case. Then the Court said, 'If the District Court interprets the contract not to apply to the facts of this case (and the facts of the case, like the present one, were an injury to an employee caused by the joint negligence of employer and shipowner) the court (that is, the District Court) would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law', and just above the Court had stated that the admiralty rule recognized contribution between joint tort-feasors. Now what the Supreme Court said was not dictum. The Supreme Court was remanding the case to the District Court with instructions and in the sentence quoted was telling the District Judge that, absent the contract of indemnity, he would be free to apply the admiralty rule of contribution. The Circuit Court of Appeals had squarely ruled that there could be no

contribution and the Supreme Court, although it did not mention the position of the Circuit Court of Appeals, certainly must have intended to overrule it.

"I think that the decision of the Supreme Court in the Porello case makes it clear that the right of contribution exists in a case of this nature," 76 F. Supp. 682, 683.

To summarize, then, the Matthews case is in conflict with the law of this Circuit as announced in the Rothschild case; it has been rejected by the Third Circuit; it is contrary to the great weight of District Court decisions from other Circuits; and it appears to be contrary to what the U.S. Supreme Court has indicated the law to be in the Porello case. It is also out of accord with general admiralty principles which are based on fairness. Therefore we submit it should not be followed by this Court.

#### SECOND — MATTHEWS CASE DISTINGUISHED....

Even if the Matthews case is accepted as good law, it does not preclude recovery in this case.. On the contrary, a close analysis of the Matthews decision shows that it supports the shipowner's right to contribution under the facts of the present case.

The facts of the Matthews case must be kept clearly in mind. The longshoreman was injured because of a defective guy rope. The defect was patent. The shipowner was negligent in supplying the defective rope. The only negligence of the stevedore was in using the rope without making an inspection. The ship had furnished the rope to be used for that very purpose.

The Court said that the ship and stevedore were not joint tort-feasors, because they were not under a common tort liability to the injured longshoreman, since the Longshoremen's Act abolished the stevedore's direct tort liability to his employee for damages. Therefore the Court said the shipowner could have "no right to contribution *based on the theory that they were joint tort-feasors.*"

But the Court then discussed another right which the shipowner might have—namely a right of indemnity based upon an implied contract by the stevedore to do the work properly. The Court recognized that when a stevedore undertakes to discharge a vessel, there is an implied undertaking to do the work properly. If the stevedore, in violation of this obligation, does not exercise due care in performing its work, and is negligent, then it has breached a duty to the shipowner. And in that case, it may be liable to the shipowner for all or part of the damages the shipowner has to pay a longshoreman injured by such negligence on the part of the stevedore-employer.

The Court refers to its prior decision in *Rich v. United States*, 177 F. 2d 688; and to *Westchester Lighting Co. vs. Westchester Estates*, 278 N.Y. 175, as being such cases.

Then the Court concludes that in the case before it, the stevedore did not violate any duty to the shipowner. For the shipowner had furnished the rope to be used, and all the stevedore did was to use the rope for the very purpose for which it was furnished by the ship. And the

Court said it would be unreasonable to imply a promise by the stevedore to inspect the rope which the ship furnished to the stevedore for use. Therefore, the Court said it could "find no contractual basis for indemnity or contribution".

Thus it is clear that even the Matthews case recognizes the duty of the stevedore to use care in the work, and the liability of the stevedore to indemnify the ship in whole or part where the stevedore has been guilty of some active negligence in performing the work.

Let us now again look at the facts in the present case. Appellee, the stevedore, was bound to use due care in the work. It owed an obligation to Appellant, the shipowner, to exercise due care in its use of the ship's appliances. It violated this obligation. It made improper use of the ladder and subjected it to excessive strains, in violation of good stevedoring practices (Finding V, Ap. 17, 18). It did not merely use the ladder for the purpose intended (as the stevedore in *Matthews* merely used the rope for the purpose intended), but it *negligently* used the ladder *for purposes not intended* (Finding V, Ap. 17). Therefore Appellee in the present case clearly violated a duty owed to the Appellant. Consequently, as clearly indicated by the Matthews case, the stevedore is liable to indemnify the shipowner for the damages suffered as a result of the stevedore's active negligence.

Our interpretation of the Matthews case is made plain upon consideration of the same Court's decision in *Barbarino v. Stanhope SS Co.* (CCA 2d 1945), 151 F. 2d 553.

In the Barbarino case a longshoreman was injured aboard ship by a falling boom. The Court of Appeals assumed, for purpose of argument, that the boom fell because a bolt, furnished by the ship, was defective and broke. But the Court of Appeals held that the ship would have a right of contribution against the stevedore if the stevedore also was negligent in the manner it did the work. The Court therefore reversed a decree exonerating the stevedore, and sent the case back to determine if the stevedore was negligent.

Thus, in the Barbarino case, the Second Circuit clearly held that a negligent shipowner has a right of contribution, under general admiralty principles, against a stevedore employer whose negligence in doing the work has contributed to the injury. This makes it clear that application of the Matthews case must be limited to those situations where the only negligence asserted against the stevedore is its failure to inspect an appliance furnished by the vessel for use.

The Barbarino case is a clear authority supporting the right to contribution in the present case, where the stevedore was actively negligent in making improper use of the vessel's equipment.

We believe the Barbarino case is still the law of the Second Circuit, as it was not referred to in the Matthews case, and has been cited frequently by the Second Circuit. The Barbarino case was also cited with apparent approval by the Supreme Court in the Porello case (330 U.S. 458; 91 L. Ed. 1020) and by this Court in the Rothschild case (183 F. 2d 183; 1950 A.M.C. 1334).

ALLOWING THE SHIOPWNER CONTRIBUTION  
FROM THE STEVEDORE IS IN ACCORD WITH  
THE GENERAL ADMIRALTY LAW GOVERNING  
RELATIONS BETWEEN THE SHIP  
AND STEVEDORE

Before closing this brief we desire to give a few examples of the general law governing relations between the ship and the stevedore.

It is well settled that the stevedore is liable to the shipowner for damage done to the vessel itself as a result of the stevedore's negligence.

*Benjamin Williams* (D.C. Mass.), 1947 A.M.C. 1547.

*Maltran* (S.D.N.Y.), 1946 A.M.C. 306.

This shows that the stevedore owes a duty direct to the shipowner to use due care in performing the work.

And where the ship itself is damaged as the result of negligence on the part of the ship and also negligence on the part of the stevedore; then the shipowner is entitled to recover half the damage from the stevedore.

*Marouko Pateras* (S.D. Ala.), 1944 A.M.C. 525, 53 F. Supp. 315.

In that case the vessel's mast was bent, due to the vessel furnishing a defective shroud, and the stevedore placing excessive strain upon it. The shipowner recovered half damages from the stevedore.

Suppose in that case the mast had fallen and injured a longshoreman, who recovered damages against the

ship. It would be ridiculous to say the ship could recover from the stevedore half the property damage to the mast, but not half the damages it had to pay the longshoreman. Obviously, the stevedore would be liable for half of both damages.

And in the present case, the stevedore also had a liability to the ship for the damage done to the ship's ladder, although that is not involved in this litigation. But the point emphasizes that the stevedore has violated a duty to the ship.

Where the ship and stevedore are both negligent, and property of a third party is damaged, then each is liable for one half the damages.

*Smith v. Nicholson Transit* (W.D.N.Y.), 1941 A.M.C. 909.

And where a stevedore company was negligent in placing the hatch boards on a vessel, and at another port a longshoreman was injured thereby, the shipowner was entitled to recover in full from the stevedore for the amount the shipowner had to pay the injured longshoreman.

*The Sagadahoc* (C.C.A. 9th), 1929 A.M.C. 865; 32 F. 2d 886.

Now these principles are all well known and settled. We merely cite them to illustrate the general law governing the relations between shipowner and stevedore. They show clearly that the stevedore has a duty to the shipowner to use due care, and that the stevedore is liable to the shipowner for its damages resulting from

the stevedore's negligence; and that where both ship and stevedore are both negligent the shipowner may recover one half its damages from the stevedore. Consistent with these principles, the ship is entitled to indemnity in full for the amount it has had to pay the stevedore's employee, when the accident has been caused by the stevedore's negligence; and to contribution of one half when the accident is caused by joint negligence of both the ship and the stevedore.

## CONCLUSION

Here is a case where the ship's ladder, although defective, was sufficiently strong for the purpose and could have been used safely as a ladder by the longshoremen. The stevedore company, in violation of good stevedoring practices, and in violation of its duty to the ship, negligently used the ladder for other purposes, so weakening it as to bring about serious injuries to its employee. Under such circumstances it would be manifestly unfair to visit the entire loss on the shipowner and let the stevedore company off entirely.

We submit that this case is governed by *U. S. A. v. Rothschild Stevedoring Company*, and that Appellant should be granted full indemnity against Appellee, based on Appellee's subsequent active negligence.

If, however, the Court should not allow full indemnity, the Appellant is at least entitled to contribution of one half the damages. This right is based on fairness, is in accordance with the general principles of admiralty law, and is supported by the great weight of authority.

Respectfully submitted,

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## APPENDIX

### ASSIGNMENTS OF ERROR

#### I.

The trial court erred in denying claimant and petitioner recovery from and against impleaded respondent, W. J. Jones & Son, Inc., by way of indemnity or contribution for the amount paid by claimant and petitioner to libelant in settlement of libelant's claims.

#### II.

The trial court erred in ruling as a matter of law, that on the facts as found by the trial court claimant and petitioner was not entitled to recovery against impleaded respondent, W. J. Jones & Son, Inc.

#### III.

The trial court erred in ruling as a matter of law, although the impleaded respondent was guilty of joint and concurrent negligence which proximately contributed to libelant's injuries, claimant and petitioner was not entitled to indemnity or contribution over and against impleaded respondent.

#### IV.

Claimant and petitioner does not allege any error with respect to the trial court's findings of fact but claims that the court erred in failing to allow claimant and petitioner's demand for indemnity or contribution from and against impleaded respondent on the basis of the facts as found by the trial court.

## STATEMENT OF POINTS ON APPEAL

1. The trial court, having found as a fact that appellee was negligent and that such negligence proximately caused and contributed to libelant's injuries, and that libelant would not have been injured except for appellee's negligence, should have granted appellant full recovery against appellee by way of indemnity.
2. The trial court found as a fact that appellee negligently subjected the ladder on appellant's vessel to improper use, and that this negligence caused and contributed to libelant's injuries, and that libelant would not have been injured except for such negligence on the part of appellee. On these facts appellant is entitled to full recovery against appellee by way of indemnity.
3. On the facts as found by the trial court, appellant is entitled to full recovery over and against appellee of the amount paid to libelant, by way of full indemnity and under the decision of this Court in U. S. v. Rothschild Stevedoring Co., 1950 A.M.C. 1332, 183 F. 2d 181.
4. On the facts as found by the trial court, if appellant should not be entitled to full indemnity, then in the alternative, appellant is at least entitled to contribution from and against appellee.

**United States  
COURT OF APPEALS  
for the Ninth Circuit**

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**UNION SULPHUR AND OIL CORPORATION,  
a Corporation,**

*Appellant,*

vs.

**W. J. JONES & SON, INC., a Corporation,**

*Appellee.*

---

**BRIEF OF APPELLEE**

---

Upon Appeal from the District Court of the United  
States for the District of Oregon.

---

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**United States  
COURT OF APPEALS  
for the Ninth Circuit**

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**UNION SULPHUR AND OIL CORPORATION,  
a Corporation,**

*Appellant,*

**vs.**

**W. J. JONES & SON, INC., a Corporation,**

*Appellee.*

---

**BRIEF OF APPELLEE**

---

Upon Appeal from the District Court of the United States for the District of Oregon.

---

**STATEMENT OF THE CASE**

Marshall, a longshoreman, was injured aboard the appellant's steamship HERMAN FRASCH when a rung on a ladder he was descending into No. 3 hold gave way, causing him to fall approximately 15 feet into the hold (Ap. 5-6, 15-16).

At the time of the accident Marshall was an employee of appellee, an independent contracting stevedore company, which was engaged in discharging sulphur from the vessel, then lying alongside a dock at Vancouver, Washington, on the navigable waters of the Columbia River (Ap. 5-6, 15, 16).

Instead of relying on his rights under the applicable Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S. Code, Sec. 901, et seq., to compensation from the appellee, his employer, Marshall elected under Sec. 933 of the Act to bring a so-called third party suit against the appellant in the form of a libel in rem against the steamship **HERMAN FRASCH** for the injuries received by him. In his libel, Marshall alleged that the accident was caused by the unseaworthy condition of the vessel and the negligence of appellant in this regard (Ap. 6-8).

Appellant filed a petition to implead appellee under Admiralty Rule 56 for the purpose of "compelling it to contribute to or pay in whole any *damages*" which might be decreed against the appellant on behalf of Marshall (Ap. 4).

Although admitting that the rung of the ladder was unseaworthy at the time of the accident, appellant claimed that this condition was caused solely by the appellee and that the proximate cause of the accident was appellee's negligence combined with the contributory negligence of Marshall (Ap. 8-11).

At the outset of the trial appellant settled Marshall's claim against it for \$6,110.00. Contrary to the statement

in appellant's brief (p. 2), appellee did not "consent" to this settlement. Rather appellee agreed that the amount paid was reasonable in view of Marshall's injuries, that insofar as it was concerned it had no objection to appellant and Marshall making any settlement they wanted to, and that a settlement could be made without prejudice to appellant's claims against appellee (Ap. 14).

After a trial on the issue of appellant's claim for recovery over against the appellee, the District Court entered a decree, in part, dismissing appellant's petition to implead appellee (Ap. 22). The court found that Marshall's injuries resulted from the "joint and concurring negligence" of both appellant and appellee—the former in that "the weld by which the steel rung was welded to the vertical uprights of the ladder was defective" and the latter in that it had negligently "used the ladder for obtaining leads to its drag lines" thereby placing heavy strains on it and causing it to vibrate excessively (Ap. 16-19).

Under these circumstances the Court ruled that appellant's claims "should be denied upon authority of Amer. Mut. Liability Ins. Co. v. Matthews, 182 F. (2) 332, 2 Circ., and in conformity with Johnson v. United States, 79 F. Supp. 448 (1948)" (Ap. 19). Thus, the court recognized that appellant's claims to recovery over against the appellee were barred by the Longshoremen's and Harbor Workers' Act, under which appellee's exclusive liability in the present case was to pay compensation to its injured employee Marshall, and that to

allow any recovery over would be to make appellee liable indirectly for that which he has no direct liability.

This appeal, therefore, presents the question of whether a shipowner can recover over against the employer of a longshoreman, injured as a result of the joint and concurring negligence of the ship and the employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, that the liability of the employer to pay compensation to the injured employee shall be conclusive of all other liability of the employer on account of such injury.

Although appellant has divided its brief into two points, one supporting an indemnification and the other a contribution theory, we shall treat both of these together, since indemnification is but "an extreme form of contribution" and appellant's right to either in the first instance depends upon the question presented on this appeal.

## ARGUMENT

**Appellant, as a Joint Tort Feasor Under the Findings of the District Court, Is Barred from Recovery Over Against Appellee, by Reason of the Longshoremen's and Harbor Workers' Compensation Act**

*A. Under Act, Appellee's Exclusive Liability Is to Pay Compensation to Injured Employee*

In essence, the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as "the Act") requires that employers of persons employed in maritime employment upon navigable waters of the United States shall be liable for the payment to employees for injuries resulting in disability or death of compensation, in accordance with schedules and procedures set up by the Act. 33 U.S. Code, Secs. 902, 903, 904. Failure of an employer to secure the payment of compensation is a misdemeanor punishable by fine or jail sentence, or both. Sec. 938.

The principal purpose of the Act was to assure longshoremen of compensation for their injuries by bringing them within the protection of a compensation act similar to that of state compensation acts. See S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. 1767, 69th Cong., 2nd Sess.; and 67 Cong. Rec. 10608-10614, 68 Cong. Rec. 5402-5414, 5900-5909. To this end the injured employee is accorded compensation regardless of fault or negli-

gence on his part. In return for thus being stripped of its common law defenses, the employer was given a fixed and exclusive liability, or, as has been said, "as an equitable adjustment for imposing liability where none was recognized previously" the Act "fixes the quantum of liability" of the employer. *Baccile v. Halcyon Lines*, 1951 A. M. C. 542, 187 F. (2) 403 (CA 3, 1951).

So Sec. 905 provides that "the liability of an employer prescribed in Sec. 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury. . . ."—with an exception not here relevant. The Act thus exempts an employer, such as the appellee, from any obligation to pay damages to its injured employees or anyone otherwise entitled to recover damages and substitutes therefor an absolute duty to pay compensation. *American Mutual Liability Insurance Co. v. Matthews*, 1950 A.M.C. 1272, 182 F. (2) 322 (CA 2, 1950). Manifestly, these requirements indicate that the purpose of the Act is "social in character and its method of effectuating the social policy is to force upon industry a real cost of its productive operations". *Baccile v. Halycon Lines*, *supra*.

Insofar as any action by an employee against his employer for the latter's negligence, the language of the Act makes it plain that the employer's liability for compensation under the statute is exclusive of any other lia-

bility either at law or in admiralty to its injured employee, or anyone suing in their right<sup>1</sup>. See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 256 (1940). Likewise, the language of Sec. 905 makes it apparent that not only is an employee and any other claimant standing in the shoes of the employee or deriving his rights through him barred by the statute, but that the language "otherwise entitled to recover damages from such employer" means that all claimants, whether asserting a derivative right "or otherwise", are barred from seeking to recover damages from the employer as a result of the injury involved. Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp., 1949 A.M.C. 818, 65 A. (2) 304 (Md. 1949). Other provisions in the Act with respect to the employer's rights as against third persons do not negative this exclusive liability<sup>2</sup>.

Under the language of Sec. 905, if an employee injured within the scope of his employment by the negligence of his employer and a third party proceeds jointly against both wrongdoers, his suit against his own employer must fail by reason of the exclusive statutory

<sup>1</sup> In reporting out Senate Bill 3170, 69th Cong., 1st Sess., which eventually became the Longshoremen's and Harbor Workers' Compensation Act, the Senate Judiciary Committee stated with reference to Sec. 905: "Sections 4, 5 [the present Sec. 905] and 6 of the bill contain the appropriate provisions for making certain that the compensation will be paid, abolishing liability on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins." Senate Report 973, 69th Cong., 1st Sess. p. 16.

<sup>2</sup> Sec. 933 provides, in part, that an employee may sue a third party in lieu of taking compensation from his employer; that if the employee fails in such action to recover as much as the statutory compensation, the employer must stand for the shortage; that where the employee accepts compensation, the employer becomes the assignee of the employee's rights against the third party; and that if the employer succeeds in recovering more than he has paid as compensation, such excess, less costs of enforcement, belongs to the employee.

liability granted in the Act. See *Benevento v. United States*, 1947 A.M.C. 469, 473, 160 F. (2) 487 (CA 2, 1947). If, however, in the same situation, the employee sues only the third party and the latter impleads and seeks recovery over against the employer by reason of the latter's negligence, we have exactly the same case. Once again the exclusive liability of the employer acts as a bar against the third party claimant who might otherwise be entitled to recovery over for the damages on account of the injury to the employee for which he is held liable.

It is in recognition of this fundamental fact—that an employer's exclusive liability on account of injuries to his employees is the payment of compensation—that a number of courts have refused to allow a third party sued by an injured employee to implead the employer in the action. *Johnson v. United States*, 79 F. Supp. 448 (D. Ore. 1948); *Frusteri v. United States*, 76 F. Supp. 667 (E.D. N.Y. 1947); *Calvino v. Pan-Atlantic S.S. Corp.*, 29 F. Supp. 1022 (S.D. N.Y. 1939); *Miranda v. City of Galveston*, 1951 A.M.C. 1309 (S.D. Tex. 1951); *Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp.*, *supra*.

*B. Because of the Act,  
Appellant May Not Recover  
Over Against Appellee as a  
Joint Tort Feasor*

Although the Act makes it clear that the appellee is not liable in damages for its negligence to libellant Marshall, appellant has pleaded as the basis for its re-

covery over against the appellee and has predicated its case on the ground that it was free of any negligence and that the proximate causes of the accident were appellee's negligence combined with the contributory negligence of Marshall (Ap. 8-11). No contractual obligation to indemnify was pleaded or proved, nor were any claims advanced that appellee was liable over to appellant on any basis other than the tort it allegedly committed against Marshall.

Under this state of the pleadings and proof if the District Court had agreed with the appellant that it was free of all fault and that appellee had been guilty of negligence, then two results would have necessarily followed: appellant could not have been held liable in damages to the libelant; and no judgment could have been given against the appellee on behalf of the libelant, since appellee's exclusive liability to the libelant was to pay him compensation, and not damages.

However, the District Court found that the appellee, in fact, was not free from fault and that its negligence was a joint and concurring cause of the accident (Ap. 16-17, 19). Appellant in its brief (pp. 6-7) takes issue with these findings, deeming them a "conclusion of law", and relies upon *Barbarino v. Stanhope SS Co.*, 1945 A.M.C. 1409, 151 F. (2) 553 (CA 2, 1945), and *Bonnewell v. United States*, 1948 A.M.C. 1954, 170 F. (2) 411 (CA 4, 1948). These two cases do not deal with causation but with the usual rule that an appellate court can make its own determination of the duty or standard of care owed by an alleged tortfeasor; they do not disturb

the general rule that what is the "proximate cause" or the "causation in fact" of an injury is a question of fact to be decided by the trier of the facts, in this instance the trial judge. See 38 Am. Jur., Negligence, Secs. 351, 352; Prosser, *Torts* (1941 Ed.), Sec. 50. In any event, in another part of its brief appellant concedes that "both the ship and the stevedore company were negligent" (p. 7) but thereafter endeavors to play down the extent of its negligence and magnify that of the appellee's.

But irrespective of whether the appellee was 10% or 90% negligent, the fact remains that the appellant is necessarily trying to recover over against the appellee as a joint tort feasor, i.e., as one whose negligence concurred in and contributed to the accident.

As a matter of statutory policy and of logic, appellee cannot have any different or greater liability under the Act if it is a joint tort feasor rather than a sole tort feasor. If appellee's only liability is to pay compensation when it is solely at fault, how can it be said to have any greater or different liability as a joint tort feasor when it is obviously less at fault?

Individually, the appellee has no liability to Marshall except for compensation and jointly with others its liability can be no greater. This is so whether appellee's responsibility for the accident is 10% or 90%, because "there is no body of sure authority for saying that differences in the degrees of fault between two tort feasors will, without more, strip one of them, if he is an employer, of the protection of a compensation Act." Slat-

tery v. Marra Bros., 1951 A.M.C. 183, 186 F. (2) 134 (CA 2, 1951), cert. denied 95 L. Ed. Adv. 533 (April 23, 1951).

Moreover, as a matter of common law or maritime law, the common liability necessary to find a basis for allowing any recovery over between joint tort feasors is missing. For a right of contribution to exist among tort feasors, they must be joint wrongdoers in the sense that their torts have imposed a common liability on them to the injured employee. American Mutual Liability Insurance Co. v. Matthews, *supra*. A person compelled to discharge a liability for a tort cannot recover contribution from another whose participation in the tort gave the injured party no cause of action against him. 13 Am. Jur., Contribution, Sec. 51.

Here the appellant and appellee were not under a common liability to the libelant. His claim against the appellee was not for damages, as was his claim against the appellant, nor was it dependent upon any tort committed by appellee. Consequently, there is no common basis of liability between appellant and appellee and no grounds exist for any recovery over. *Matthews* case, *supra*.

Although the *Matthews* case may well be deemed the leading case and was recognized as such by the trial court below, there are numerous recent cases—contrary to some of the earlier district court cases cited in appellant's brief—which hold that a third party sued by an injured longshoreman may not look to the longshoreman's employer for indemnification or contribution in a

factual situation where the third party has contributed in some measure to the injury and where there is no contract of indemnity involved. Slattery v. Marra Bros., *supra*; LoBue v. United States, 1951 A.M.C. 840, 188 F. (2) 800 (CA 2, 1951); Liberty Mutual Insurance Co. v. Vallendingham, 1951 A.M.C. 287, 94 F. Supp. 17 (D.C. 1950); Miranda v. City of Galveston, 1951 A.M.C. 1309 (D.C. S.D. Tex. 1951); Porello v. United States, 1946 A.M.C. 163, 153 F. (2) 605, 607 (CA 2, 1946); Standard Wholesale Phosphate & Acid Works v. Rukert Terminals, *supra*; *accord* cases at end of part A of this brief; see Spaulding v. Parry Navigation Co., 1951 A.M.C. 441, 443, 187 F. (2) 257 (CA 2, 1951).

A good summary of some of the reasons lying behind these holdings was made by the Maryland Court of Appeals in the *Standard Wholesale P. & A.* case, *supra*, which was decided a year prior to the *Matthews* case:

"In the absence of waiver, the employer's conformance with the statute, by providing compensation in all cases regardless of fault, prevents recovery against him on the ground of negligence. The statute declares his liability for compensation to be exclusive. If it should be construed to preserve his liability, for the payment of a sum measured in whole or in part by the damages sustained by the employee, merely because the negligence of a third party concurred, or is claimed to have concurred, with his own in producing the injury, his liability for compensation would not be exclusive. It is probable that his liability would in most cases exceed the limits set up in the statute. We think it is immaterial whether his liability to a joint tortfeasor stems from a statutory right to contribution or from general principles of the admiralty law. In

either event it is essentially a liability to pay, or share in the payment of, damages for the injury to his employee, of which the statute relieves him. We think the appellant falls squarely within the definition of 'anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.' It follows that his right to indemnity or contribution is foreclosed by the Act, and hence the employer cannot be impleaded."

Appellant finds fault with the *Matthews* case as being "wrong" under case precedents (discussed infra) and as being out of accord with principles of "fairness" (App. Br. 13-19). Appellant apparently can not reconcile itself to the fact that here we do not merely have the case of two tort feasors among whom admiralty will divide damages; but rather that of two tort feasors, one of whom is an employer subject to the obligations imposed by the Act whereby it has been made absolutely, though limitedly, liable but in return has been given a release from any other liability. To allow recovery over means that the employer loses even the limited part of the absolute liability put on it by the Act. Fairness is, after all, a relative matter; and the *Matthews* case drew the line in keeping with the purpose and language of the Act. If appellant disagrees with the balance of equities struck by the Act, it should urge its case before Congress and not, we submit, before this Court. Further, we would point out that appellant can always protect itself against situations like the present one by contract, as, for example, the United States did with its so-called Warshipsteve contracts. See *United States v. Arrow Stevedoring Co.*, 1949 A.M.C. 1444, 175 F. (2) 329 (CA 9, 1949), cert. denied 338 U.S. 904 (1949).

Appellant also finds fault with *Johnson v. United States*, supra, on the ground that the "shipowner's right to contribution against the stevedore employer has no effect whatever on the employee's right to compensation if he elects to receive it" (App. Br. 11). If the employee elects to receive compensation, it is not discernible how he may proceed against the shipowner; but in any event appellant misses the point of Judge McColloch's few well-chosen words that to permit an employer under the Act to be impleaded by a third party is to permit him to be sued indirectly and is like opening a hole in the dike that the compensation acts constitute. Clearly if the employer may be held accountable indirectly for that which he was not directly accountable, then all elements of fairness are taken out of the Act insofar as the employer is concerned, for he then stands accountable in damages to his employees and he is stripped of the right to plead the many common law tort defenses.

#### THE MATTER OF ACTIVE-PASSIVE NEGLIGENCE

To justify the relief it seeks, appellant throughout its brief seeks to disregard the fact that its negligence concurred in and contributed to libelant's injury, by referring to appellee's concurring negligence as "active" negligence.

In so doing the appellant presumably seeks to take advantage of cases where courts have, in the *absence* of a compensation act, based indemnity merely upon a difference of the kinds of negligence of the two tort

feasors, as for example, where the negligence of the indemnitee is said to be only "passive" while that of the indemnitor is "active". Such cases, the Court of Appeals for the Second Circuit has noted, may perhaps be accounted for as "lenient exceptions to the doctrine there can be no contribution between joint tort feasors, for indemnity is only an extreme form of contribution" and because "when both are liable to the same person for a single joint wrong, and contribution, stricti juris, is impossible, the temptation is strong if the faults differ greatly in gravity, to throw the whole loss upon the more guilty of the two". *Slattery v. Marra Bros.*, *supra*.

However, when the Act is present, this may not be logically or properly done. Basic to any such doctrine is that the active and passive tort feasors are both liable to the same person for their joint wrong. If so, when one of the two is not liable, as in this case where the appellee has no liability to libelant, any claimed right to indemnity cannot be based on an active-passive negligence doctrine. Accordingly, where two persons have both contributed to a tort, even though there is a difference in the gravity of their faults, it is not possible to put the whole loss on the "active" tort feasor, if he is not liable to the injured person. *Spaulding v. Parry Navigation Co.*, *supra*. Furthermore, there is no authority there for saying that the differences in degrees of fault between the appellant and the appellee is sufficient, without more, to strip the appellee of the protection of the Compensation Act. *Slattery v. Marra Bros.* *supra*.

## APPELLANT'S AUTHORITIES

United States v. Rothschild Stevedoring Co., 150 A.M.C. 1332, 183 F. (2) 181, is relied upon by appellant as entitling it to full indemnity (App. Br. 5-7). The issue raised in this appeal was not presented to the court in the *Rothschild* case, nor insofar as we have been able to discover by reviewing the briefs and discussing the case with one of the counsel therein was the effect of the Act ever argued or presented to the court. Such a conclusion is re-enforced by the opinion in the *Rothschild* case which discloses that the "sole question" presented to the court was "which party or parties were responsible proximately for the accident causing the injury". Obviously to be available as a binding precedent on an issue, the court must have had presented to it and dealt with that precise issue.

Another basis for distinguishing the *Rothschild* case was suggested in *Slattery v. Marra Bros.*, supra, wherein the court noted that "it is not clear that the decision did not presuppose that the stevedore failed in the performance of its contract with the ship". The truth of this observation is borne out by reference to the brief of the appellant in *Rothschild* case (see pages 12-14, 16-20) wherein recovery over was sought on the ground of the terms of the warshipsteve contract between the shipowner and the stevedore. The appellee therein did not dispute its contractual duty, but contended the accident was not caused by its failure to perform properly under the contract (see appellee brief, p. 27). In contrast, there is no underlying contract or indemnity

agreement in the present case which may serve as the foundation for allowing recovery over against any "primary" tort feasor.

On page 8 of its brief, appellant cites a string of thirteen cases as "the weight of authority" allowing the shipowner contribution against the stevedore. Of these only six appear to be contrary to appellee's position herein and we submit they are not the more recent weight of authority<sup>3</sup>. Four of the cases cited are not in point here as they turn on contracts of indemnification<sup>4</sup>. Another case did not consider the effect of the Act as a bar<sup>5</sup>; and another supports the position of appellee rather than appellant<sup>6</sup>.

The *Chattahoochee*, 173 U.S. 540 (1899), is cited to support the contention that the Act is not applicable (App. Br. 9). This case, however, involved the Harter Act. It has been well distinguished by Judges Swan and Learned Hand in the *Matthews* case, *supra*. See also, *Standard Wholesale P. & A.*, *supra*.

*Baccile v. Halycon Lines*, *supra*, is cited to prove the *Matthews* case is "wrong" (App. Br. 13-14). In this

<sup>3</sup> *Lascovitch v. S.S. Samovar*, 1947 A.M.C. 1046, 72 F. Supp. 574 (N.D. Calif. 1947); *Coal Operators Gas Co. v. United States*, 1948 A.M.C. 127, 76 F. Supp. 681 (E.D. Pa. 1948); *Christon v. United States*, 1948 A.M.C. 953 (E.D. Pa.); *The Tampico*, 1942 A.M.C. 955, 45 F. Supp. 174 (W.D. N.Y. 1942); *Rederii v. Jarka Corp.*, 1939 A.M.C. 476, 26 F. Supp. 304 (Me. 1939); *Portel v. United States*, 1949 A.M.C. 487, 85 F. Supp. 458 (S.D. N.Y. 1949).

<sup>4</sup> *Severn v. United States*, 1946 A.M.C. 1468, 69 F. Supp. 21 (S.D. N.Y. 1946); *Green v. W.S.A.*, 1946 A.M.C. 874, 66 F. Supp. 393 (E.D. N.Y. 1946); *Brosman v. A.P.L.*, 1943 A.M.C. 526 (S.D. N.Y.); *American Stevedores v. Porello*, 330 U.S. 446 (1947).

<sup>5</sup> *Barbarino v. Stanhope SS Co.*, 1945 A.M.C. 1409, 151 F. (2) 553 (CA 2, 1945).

<sup>6</sup> *Calvino v. Pan Atlantic SS Corp.*, 1940 A.M.C. 289, 29 F. Supp. 1022 (S.D. N.Y. 1940).

case the court reconciled what it deemed the conflict between the exclusive liability given to the employer under the Act with the "impropriety" of permitting the injured employee by his election to determine which one of two wrongdoers should be held responsible, by allowing the third party to recover from the employer the amount of compensation which the employer would have had to pay to the injured employee had the latter elected to receive compensation. Admittedly a novel case in this field, the *Baccile* is not contrary to the *Matthews* case, for the court acknowledged that no common liability could be said to exist as between an employer and a third party and refused to allow the third party to recover over more than the amount of compensation because "then the third party is merely the conduit between the employer and the employee for the transfer of damages in excess of compensation". At most the *Baccile* case represents a modification of the result of the *Matthews* case and a judicial reluctance to give full effect to the language and purpose of a Congressional enactment.

American Stevedores v. Porello, 330 U.S. 446 (1947) (App. Br. 16), does not justify the claims made for it, as the court was primarily concerned with other questions. See *Johnson v. United States*, supra. A stevedore was injured aboard a Navy transport and brought suit against the United States, who impleaded the stevedore. The District Court entered a decree against the United States for damages due to the injury, less a sum due to the libelant as compensation under the Longshoremen's Act, with contribution as to one-half from the em-

ployer. On appeal, the Court of Appeals for the Second Circuit found that the United States was entitled to full indemnity under its contract with the employer and in the course of its opinion stated: "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay." 153 F. (2) 605. On rehearing, the Court of Appeals said that the matter of the right of contribution should be left open, since it was not essential to its decision as to the stevedore's liability under its contract with the United States. 153 F. (2) 609. Upon certiorari, the Supreme Court remanded the case to the District Court for the taking of evidence as to the intention of the parties as an aid to construing the indemnity clause in the contract. The Supreme Court said:

"If the District Court interprets the contract not to apply to the facts of this case, the Court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law."

We submit that a statement that the court is "free to adjudge . . . under applicable rules" does not determine what those rules are, as applied to the facts of the case, but simply leaves the question open, as it was left open by the Circuit Court of Appeals. See Standard Wholesale P. & A. v. Rukert, *supra*; Rich v. United States, 1949 A.M.C. 2079, 177 F. (2) 688 (CA 2, 1949). Appellant's statement—that by referring to the "applicable rules" of admiralty law the Supreme Court was referring to a preceding statement made by it that the

usual rule in admiralty is for each joint tort feasor to pay a moiety of the damages—is not warranted. The Court's statement with reference to the admiralty rule was made for the purpose of showing that it was possible that the contract itself could be construed to have several alternative meanings.

Coal Operators Gas Co. v. United States, 1948 A.M.C. 127, 76 F. Supp. 681 (E.D. Pa. 1947), relied on as supporting appellant's interpretation of the *American Stevedores v. Porello* case (App. Br. 17-19), was a case where the court thought that the Supreme Court in the Porello case, supra, was "telling the District Judge that, absent the contract of indemnity, he would be free to apply the admiralty rule of contribution". But it appears that his reason for so thinking was that "the Court of Appeals had squarely ruled that there could be no contribution, and the Supreme Court, although it did not mention the position of the Circuit Court of Appeals, certainly must have intended to overrule it." In so ruling, the District Judge overlooked the fact that in the appeal before the Supreme Court the Court of Appeals had expressly left open the question of contribution in denying a petition for rehearing.

### C. *Appellant May Not Recover Over Against Appellee on a Contract Basis*

As a means of distinguishing the *Matthews* case, appellant in its brief (pp. 19-21) suggests—for the first time—that it has a right of indemnity based upon an

implied contract by the appellee to perform properly the work undertaken by it. In its pleadings and in the case which was tried before the District Court, appellant made no claim to indemnity upon the basis of a contract, express or implied, with the appellee.

Concededly, an employer subject to the Act may by contract with a third party bind itself to indemnify the latter against liability resulting from improper performance of the work undertaken by the employer. Matthews case; see *United States v. Arrow Stevedoring Co.*, *supra*.

Such is not the present case. Appellee had no contractual relations with the appellant, inasmuch as appellee was unloading the steamship HERMAN FRASCH under contract with the owner of the sulphur which was aboard the vessel and not with the ship. Although the findings of the District Court do not reflect this fact, we do not believe that the appellant will dispute it.

In any event, the record is barren of evidence from which a contract between the appellant and appellee can be implied that the appellee would perform its work properly and would indemnify the appellant against any damages suffered by the latter as a result of appellee's failure to do so.

The most that can be said of the relations between the appellant and appellee is that the appellee, like any other business invitee aboard the vessel, was under a duty to use due care and not be negligent with respect to the ship. For any damage to the ship caused by appellee's negligence, the ship would admittedly have a cause of action; and if the appellant was jointly negli-

gent it would undoubtedly be entitled to recover only part of the damage. On the other hand, for any damage to its employee aboard the ship caused by appellee's negligence, the appellee is liable only under the Act; and if the appellant was jointly negligent in causing the injury, then its only basis for recovery over is its relationship with appellee as a joint tort feasor and on this basis its recovery over is barred by the Act. In asserting that it is "ridiculous" to allow the ship to recover half the property damages but not half of the "damages" suffered by the employee (App. Br. 24), appellant once again chooses to disregard the Act and its effect upon the present case.

In point here is *Slattery v. Marra Bros.*, *supra*, where a longshore employee was injured by a sliding door on a pier which was found to be defectively rigged and was negligently used by the stevedore. The employee sued the tenant of the pier who, in turn, brought a third party complaint against the stevedore for full indemnification on the theory that it was primarily negligent in unsafely using the door. In affirming the dismissal of the third party complaint, the Court of Appeals for the Second Circuit pointed out that right of the pier-tenant to indemnity would have to arise as a result of some legal transactions between the two parties. The court then goes on to point out that under the facts, as here, the pier-tenant had no contract or any other legal relations with the employer except that of joint tort feasor; and on this basis there was no grounds for recovery over under the doctrine of the *Matthews* case.

## CONCLUSION

Appellee's sole liability under the language of the Act is to pay compensation, not damages to libelant or anyone like the appellant who might "otherwise" be entitled to recover damages.

To allow appellant to recover over against appellee is to ignore the statutory language and to disregard its plain purpose, by making the appellee indirectly liable for that which it is not directly liable and by making the appellant merely the conduit for the recovery of damages by libelant from appellee.

For the court to impose a non-contractual duty of indemnification or contribution on appellant is to deprive it of the immunity which the Act grants it in exchange for its absolute, though limited, liability to pay compensation to its employees.

In the words of Judge Learned Hand, concurring in the *Matthews* case:

"I agree that the Longshoremen's and Harbor Workers' Compensation Act need not inevitably be construed to include a release, not only from direct claims by employees, but from contribution to third persons from whom employees have recovered; and the reason I think it should be so construed is that it has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. The release should, I submit, have the same scope as the imposed liability, which Act extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone."

For the foregoing reasons, we respectfully ask this Court to affirm the decree of the trial court.

Respectfully submitted,

**GUNTHER F. KRAUSE,**

**WALTER H. EVANS, JR.,**

**DENNIS LINDSAY,**

Proctors for Appellee.

No. 12944

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United States  
Court of Appeals  
for the Ninth Circuit.

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McNAIR REALTY COMPANY, a Corporation,  
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee,

GAMBLE-SKOGMO, INC., a Corporation,  
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Montana.



No. 12944

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United States  
Court of Appeals  
for the Ninth Circuit.

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McNAIR REALTY COMPANY, a Corporation,  
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vs.

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In the District Court of the United States, District  
of Montana, Great Falls Division

No. 1195

GAMBLE-SKOGMO, INC., a Corporation,  
Plaintiff,  
vs.

McNAIR REALTY COMPANY, a Corporation,  
Defendant.

### COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

#### I.

Plaintiff, Gamble-Skogmo, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Defendant, McNair Realty Company, is a corporation, organized and existing under and by virtue of the laws of the State of Montana, having its principal office and place of business at Great Falls, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00).

#### II.

On December 27, 1943, the defendant leased to the plaintiff a one-story building and basement situated on the West Half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Cascade County,

Montana, known as 521-523-525 Central Avenue, for the period from March 1, 1944, to and including the last day of February, 1954, by a [2\*] written lease, a copy of which is hereto attached as "Exhibit A." Said lease provides in part:

2. "In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instrument duly acknowledged, as rental for said demised premises during said term a rental at the rate of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of Four Hundred Fifty and No/100 Dollars (\$450.00) each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises."

### III.

Thereafter, plaintiff took possession of said one-story building and occupied same under said lease, duly performing all the covenants therein contained binding upon it. Subsequently to the taking of possession, the plaintiff made certain net retail sales of farm equipment and other items which sales were

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

had and obtained elsewhere than on the above-described demised premises. The defendant claims that it is entitled to a rental of two per cent (2%) on all such sales and that, therefore, the plaintiff is indebted to the defendant for a sum of money in excess of Three Thousand Dollars (\$3000.00), exclusive of interest and costs, although the exact sum claimed by the defendant is not known to the plaintiff. The plaintiff denies these claims and contends that said sales of farm equipment and other items were not within the provision of Paragraph 2 of [3] said written lease hereinabove set forth.

#### IV.

The said written lease provides in part:

16. "If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to reenter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to reposess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

## V.

On or about October 3, 1949, the defendant sent a letter by registered mail to the plaintiff advising it that "under Paragraph 16 of the lease, the term thereof is hereby declared terminated," a copy of which letter is hereto attached as "Exhibit B." The defendant claims that there is a default in the payment of rent and that it has elected to terminate the said written lease. The plaintiff claims that it has not defaulted in the payment of rent or in any of the covenants of said written lease. The plaintiff further contends that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation [4] to the defendant for such failure if any exists.

## VI.

On or about the 10th day of October, 1949, a demand was made upon the manager of plaintiff's store at the above-described demised premises that such manager immediately surrender possession of said premises, which demand was refused. After the 10th day of October, 1949, and before the 19th day of October, 1949, although the exact date is not known to the plaintiff, a letter was signed by the defendant and mailed to the plaintiff advising the plaintiff that "commencing October 3, 1949, your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of \$300.00 per

day until McNair Realty Company has regained possession," a copy of which letter is hereto attached as "Exhibit C."

### VII.

The plaintiff contends that the defendant is not entitled to possession of the said demised premises, that the said written lease is not terminated, that the plaintiff's occupancy of the premises is not on a day-to-day basis, and that the rate of Three Hundred Dollars (\$300.00) per day, as rental for the said demised premises, is unjust, unreasonable, and has not been agreed upon between the parties. The defendant denies these contentions of the plaintiff.

### VIII.

The right of the plaintiff to continue and remain in possession of the above-described demised premises under said written lease is of great value to the plaintiff, namely, of the value of over Three Thousand Dollars (\$3000.00). [5]

### IX.

The plaintiff disputes and denies each and all of the above-described claims and contentions made by the defendant and there is an actual controversy between the parties as to their legal rights and duties under said written lease and the facts hereinbefore stated.

Wherefore, plaintiff, as a party interested under said written lease of December 27, 1943, prays this Court for a declaration of the rights and duties of

the parties hereto under said written lease and the facts hereinabove set forth:

- (a) As to whether the plaintiff owes the defendant any sum of money as rental;
- (b) As to whether or not the plaintiff is in default of any of the covenants contained in said written lease;
- (c) As to whether the said written lease is terminated and forfeited;
- (d) As to whether the defendant is entitled to immediate possession of the said demised premises;
- (e) As to the relationship under which the plaintiff now occupies said demised premises and the correct rental therefor.

And the plaintiff demands judgment determining in full the rights and duties of the parties hereto upon the matters in dispute hereinabove set forth and such further relief as is meet and proper in the premises.

CHURCH, HARRIS,  
JOHNSON & WILLIAMS,

By /s/ CARTER WILLIAMS,  
Attorney for Plaintiff. [6]

## EXHIBIT "A"

## Parties

This Indenture of Lease, in duplicate, made and entered into this 27th day of December, 1943, between McNair Realty Company, a Montana corporation of Great Falls, Montana, and Gamble-Skogmo, Inc., a Delaware corporation, having its principal office and place of business at 700 Washington Avenue North, Minneapolis, Minnesota, hereinafter called Lessee.

## Premises

Witnesseth: That the Lessor in consideration of the covenants herein does hereby demise and lease unto the Lessee, the following described premises situated in the City of Great Falls, County of Cascade, and State of Montana, described as follows:

One-story building and basement, situated on the West Half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, according to the map or plat thereof on file and of record in the office of the County Clerk and Recorder for Cascade County, Montana,

and known as 521-523-525 Central Avenue, together with the appurtenances thereto belonging, and means of ingress to and egress from said premises; for the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith.

Time is the essence of this lease and all the provisions hereof.

#### Term

1. The said demise and lease commences on the first day of March, 1944, and is to continue to and including the last day of February, 1954, being a period of ten (10) years, no months.

#### Possession

Possession of the premises shall be given to the Lessee on or before March 1, 1944, with rent accruing to the beginning date of the lease. [7]

#### Rental

2. In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instrument duly acknowledged, as rental for said demised premises during said term a rental at the rate of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees

or sales or transfers of merchandise to other Gamble Stores.

Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for.

### Renewal Privilege

It is agreed that the Lessee is not held responsible for any additional term beyond the expiration date of the lease because of failure to give notice of such intention. The Lessee may continue to occupy the premises beyond the expiration date, on the same terms and conditions as in this lease as a tenant at will, and which tenancy may be terminated and ended by either the Lessor or Lessee upon at least 60 days' written notice. Such tenancy, however, to end on the last day of a calendar month. [8]

### Ownership and Possession Warranty

4. The Lessor or Lessor's agent expressly covenants that the Lessor is lawfully seized of the entire premises hereby demised and has good right and lawful authority to enter into this lease for the full terms aforesaid, or any extensions thereof, and will upon request of the Lessee immediately furnish the Lessee with proof satisfactory to Lessee in substantiation thereof. That the Lessor will put the Lessee

in actual possession of the hereby demised premises at the beginning of the term aforesaid, and that the said Lessee upon paying the said rent and performing and covenants herein agreed by it to be performed, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the said term.

5. The Lessor agrees that he will have done at his own expense but to the Lessee's reasonable satisfaction prior to the time of the beginning of the term of this lease any renovating or repairing which may be required to make said premises thoroughly sanitary and to put them in first class tenantable condition and any and all renovating and repairing, which the parties have agreed to be done by the Lessor. The Lessor shall keep the exterior and all structural portions of the demised premises including walls, foundations, roof, floors, ceilings, chimneys, ordinary and plate glass windows, rain spouting, and sidewalks in good order and repair and safe condition during the term of this lease or any extension thereof. Lessee will be required to replace any ordinary or plate glass windows broken by Lessee or through Lessee's acts. The Lessee is to make all necessary incidental repairs to the interior of said premises except the interior repairs, if any, which are agreed to be made by the Lessor prior to or after the [9] taking effect of this lease. It is expressly agreed and understood that should the Lessor neglect or refuse to make such repairs of such property as he agrees to make hereunder

within a reasonable time after notice that same are needed, the Lessee shall have the option of either having such repairs made and deducting the expense thereof from the rent payable by it or of vacating such premises, in which case this lease shall cease and come to an end, on account of the breach of such agreement to repair.

### Repairs and Alterations

Repairs and improvements to be made by the Lessor prior to the commencement of this lease are as follows:

Remove present wood floor in the west fifty (50) feet, provide and lay an asphalt tile floor or similar quality material, colors according to Lessee's selection, in the front One Hundred Twenty (120) feet of this room first closing and flooring over the stair well to the basement in the front east side. Adjust heat radiators to Lessee's needs. Repair plastered walls and ceilings; relocate the wash sink, placing it on a rear wall or side wall at the rear; repair freight chute to basement, placing in good operating condition; repair the warped window sills in the front; place electric wiring in good condition to meet the Underwriter's code and repair all electrical outlets on both side walls and posts; finish inside of window transom with plaster board or some similar material. Decorate: paint ceiling and walls of first floor one coat with Gamble's Dura-Tone or a product of similar material, paint woodwork one coat of enamel,

all according to Gamble's standard design and colors. Remove the dividing partition wall on grade floor between 523-525 and finish floor and ceiling to match as near as possible.

Lessor will not be held liable for failure to comply with any of the above alteration requirements due to Government restrictions or War conditions. [10]

6. The Lessor further covenants that the premises hereby demised, the fixtures therein and appurtenances thereto (including the boilers, heating apparatus, elevators, stairways, fire escapes, pipes, wiring, awning frames, and all other service apparatus) will be delivered to the Lessee at the beginning of the term hereof in safe condition, good working order and repair. All said fixtures and appurtenances are to conform to the laws, ordinances, rules and regulations of duly constituted authorities. Lessor will, at the sole risk and expense of the Lessor, at all times during the term hereof: promptly comply with all laws, ordinances, rules and regulations applicable thereto, and supply all apparatus appliances and materials and complete all work in, upon and about the leased premises which may be required or ordered by law, or any lawful authority. Should the Lessor neglect or refuse so to do within a reasonable time after notice, the Lessee, without liability of forfeiture, may supply said apparatus, appliances and materials, complete said work and deduct the actual cost thereof from the rent thereafter falling due hereunder; provided, however, that this covenant shall not apply to or

embrace any fixtures and appurtenances installed by the Lessee, or repairs, alterations or improvements made by the Lessee in, upon and about said demised premises and as to all said installations and improvements the Lessee shall assume responsibility for compliance with the law. The Lessee will comply with all lawful requirements of the local Health Board, Police and Fire Departments, and municipal authorities respecting the manner in which it uses the leased premises. [11]

7. The Lessor agrees to furnish an adequate heating plant, equipment and apparatus in said demised premises of sufficient capacity to maintain seventy (70) degrees of heat throughout said demised premises. The Lessor agrees that he will keep the plumbing, heating plant, electric wiring, and other appurtenances whereby said demised premises are served in good, serviceable, and safe condition during the term of this lease, except through neglect or misuse by Lessee.

### Heating

8. The Lessor agrees to furnish proper and sufficient heat for such demised premises whenever such heat is needed.

### Heat, Water, Gas and Electricity

9. The Lessee will pay all charges made against said leased premises for gas, water and electricity furnished to the demised premises during the continuance of this lease, as the same shall become

due at the rate charged therefor by the public or utility corporation furnishing such service. Any charges for and heat furnished to the demised premises which the Lessor has agreed herein to pay or furnish may, in the event of his failure to furnish or pay the same when due, be paid by the Lessee and deducted by it from the rent payable hereunder. In addition, the Lessee agrees to pay garbage collection charges assessed against these premises by the City of Great Falls for services rendered.

#### Fire Clause

10. In the event the leased premises be damaged by fire, earthquake, or other casualty, they shall be promptly repaired by the Lessor, and an abatement shall be made from the rent corresponding with the time during which and the extent to which they may not be used by the Lessee after damage occurring as aforesaid, [12] and before repair. In the event of the total destruction of the said premises by fire, earthquake, or other casualty this lease shall cease and come to an end, and the Lessee shall be liable for rent only up to the time of such destruction. In the event of a partial destruction of said premises such as to render them unsuitable for the business of the Lessee, then at its option this lease shall cease and come to an end, and the Lessee shall be liable for the rent only up to the time of such partial destruction of said premises such as to render them unsuitable for the business of the Lessee, then at its option this lease shall cease and come to an end, and the Lessee shall be liable for

the rent only up to the time of such partial destruction of the leased premises. In the event of the occurrence of either of the two contingencies last mentioned the Lessee shall be entitled to receive a prorata refund out of any advance rent paid by it for the rent period during which such premises are untenantable on account of such injury or destruction.

#### Sublet Clause

11. The Lessee may not let or underlet the whole or any part of said demised premises.

#### Surrender of Premises

12. At the expiration of said term, Lessee will quit and surrender the premises hereby demised in as good state and condition as received, reasonable wear and tear and damage by fire or the elements or from other causes beyond its control excepted. In the event the Lessee is to vacate the premises at the expiration of this lease, or any renewals thereof, the Lessee at his option shall be allowed to occupy the premises for not more than thirty (30) days after the expiration date of this lease, and shall pay the Lessor rental for the proportional part of the month so occupied at a rate in [13] [Printer's Note: Balance of paragraph missing in copy.]

#### Access to Premises

13. Lessor will have reasonable access during business hours to the premises hereby leased for the purpose of examining and exhibiting of said premises, or to make any needful repairs or altera-

tions of said premises, which said Lessor may see fit to make; but the examining and exhibiting of said premises, and any repairs or alterations to be made by Lessor, shall not in any manner interfere with the business of the Lessee but shall be done during the regular business hours of Lessee unless otherwise agreed upon by the parties hereto. Lessor will also be allowed to have placed upon said premises during a period of thirty (30) days prior to the expiration of this lease, in the usual form and in a suitable place a "To Rent" or "To Let" sign, and the Lessee will not interfere with same.

#### **Removal of Fixtures**

14. The Lessee shall have the right at the expiration of this lease or any extension thereof to remove any and all fixtures, shelving, exterior signs, or such equipment which it may have installed and paid for in said premises, the same to be removed, however, with as little damage to the building as possible.

The following electric light fixtures, now in the building, are the property of the Lessor: None; store light fixtures and window light fixtures: None.

#### **Signs and Painting Front**

15. The Lessee shall have the right to paint the store front with its own colors, and at the termination of this lease, Lessee shall have the right to repaint the store front in its original colors or some other color not similar to Lessee's regular colors,

and as may be satisfactory to the Lessor. Lessee shall have the right and privilege of installing necessary and usual trade signs on the herein demised premises including an [14] [Printer's Note: Balance of paragraph missing in copy.]

### Termination of Lease

16. If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants. If at any time during the term of this lease, or any renewal thereof, there shall be enacted or promulgated any so-called "anti-chain store" legislation or governmental regulations applicable in terms to the Lessee in connection with the business transacted by it on the demised premises (including any statute, ordinance, or other legislation or any regulation purporting to impose a tax, fee, or requirement in connection with such business additional in amount and kind to that which would have been applicable

if the Lessee operated only the demised premises) then, and in either of such events, the Lessee may at its option terminate this lease upon ninety (90) days' written notice to the Lessor. This optional right to terminate the lease shall not be affected by pending proceedings challenging the validity of such legislation or regulations nor by any determination that the same are invalid excepting only that no such notice of termination [15] shall be served after a final determination of invalidity by the highest court of the state in which the demised premises are located or by the United States Supreme Court.

In the event that the Lessor can deliver the premises prior to March 1, 1944, the Lessee will accept same upon ten days' advance written notice, on the first or fifteenth of any month. In the event of occupancy by the Lessee prior to March 1, 1944, such term shall be considered as a separate accounting period on a pro rata basis, the lease years being understood to start March 1, 1944.

Lessor agrees to absorb one-half of the actual rental loss from March 1, 1944, on the premises now occupied by the Lessee under its lease with Victor Ario and Joseph Wright at 619 Central Avenue, Great Falls, Montana.

#### Write Special Clauses Here

Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1949, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of

\$5,400.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1950, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$4,320.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1951, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$3,240.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 29, 1952, by [16] giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$2,160.00; Lessee may cancel this lease and all of its provisions and obligations thereunder as of February 28, 1953, by giving a written notice six months in advance of this cancellation date and making a cash settlement with the Lessors in the amount of \$1,080.00.

#### Lease Binding on Heirs, etc.

Each and every provision of this lease shall bind and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the respective parties hereto. Masculine pronouns shall be construed as feminine or neuter pronouns and singular pronouns and verbs shall be construed as plural in any place or places herein in which the context may require such construction.

**Lease Covers All Obligations**

This lease covers in full each and every obligation of every kind or nature whatsoever from the Lessee to the said Lessor concerning the premises hereby demised, no verbal agreements shall be held to vary the provisions hereof, any statute, law, or custom of the State in which said premises are situated to the contrary notwithstanding.

When signed by the proposed Lessor this document shall constitute an offer to Gamble-Skogmo, Inc., on the terms and conditions herein set forth, which may be accepted by Gamble-Skogmo, Inc., by execution of this instrument by its officers. This offer by Lessor shall expire .....  
19.....

In Witness Whereof the parties hereto have executed this instrument in duplicate the day and year [17] first above written.

[Seal] **McNAIR REALTY COMPANY,**

By /s/ C. S. McNAIR,

By /s/ B. P. McNAIR,

Lessor, Sec.-Treas.

[Seal] **GAMBLE-SKOGMO, INC.,**

By /s/ P. W. SKOGMO,

Its President.

By /s/ M. O. WEIBY,

Its Secretary,

Lessee.

Witness:

/s/ C. L. McPHERSON,  
/s/ E. L. McPHERSON,

As to Lessor.

/s/ M. F. HOBEN,  
/s/ B. A. GREEN,

Prepared by: MFH.

Submitted for approval by: MFH. [18]

### EXHIBIT "B"

Law Offices of  
Hall and Alexander  
Strain Building  
Great Falls, Montana

October 3, 1949

H. Cleveland Hall,  
Edw. C. Alexander,  
Howard C. Burton.

Gamble-Skogmo, Inc.,  
700 Washington Avenue North,  
Minneapolis, Minnesota.

Gentlemen:

McNair Realty Co. of this City has turned over to us for our attention the controversy which has existed for several months between you and the McNair Realty Co. concerning the rents payable under your lease dated December 27, 1943. The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay

the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated. In the immediate future, without further notice, McNair Realty Co. will re-enter the premises pursuant to paragraph 16 for the purpose of remodeling the same for rental to others. Action for rentals due will thereafter be filed. Please govern yourself accordingly.

Very truly yours,

HALL AND ALEXANDER,

By /s/ H. C. HALL.

HCH :ekm

Registered

Return Receipt Requested. [19]

#### EXHIBIT "C"

Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis, Minnesota.

Gentlemen:

On October 10th, 1949, demand was made upon Mr. Dale Cockayne, your manager at Great Falls, Montana, for the immediate surrender of the premises now occupied by you in Great Falls under the former lease between McNair Realty Company and Gamble-Skogmo, Inc., dated December 27th, 1943, which was terminated October 3rd, 1949. Copy of

such demand is herewith enclosed for your information.

Your manager refused to surrender possession as demanded. This is to advise you that commencing October 3rd, 1949, your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of \$300.00 per day until McNair Realty Company has regained possession.

Yours very truly,

McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,  
President.

[Endorsed]: Filed November 1, 1949. [20]

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[Title of District Court and Cause.]

### ANSWER

Comes Now the defendant above named, McNair Realty Company, a corporation, and, for its Answer to the Complaint of plaintiff, admits, denies and alleges:

#### I.

Answering paragraph I, defendant admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Admits that defendant is a corporation organized and existing under and by virtue of the laws of Montana, hav-

ing its principal office and place of business at Great Falls, Montana. Denies that there is any controversy between plaintiff and defendant concerning the matters set forth in plaintiff's Complaint, or that any matter in controversy between plaintiff and defendant exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

## II.

Admits the allegation of Paragraph II of said Complaint and alleges that said lease further provided: [21]

"No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.

"Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for."

Said lease was prepared by said plaintiff upon its own printed form G-404 B, and the language therein contained is the language of plaintiff.

## III.

Answering paragraph III, defendant admits that plaintiff entered into the possession of the leased premises on or about the 1st day of March, 1944,

and remained in possession thereof under said lease until on or about the 3rd day of October, 1949, upon which day said lease was terminated. Denies that said plaintiff duly or otherwise performed all of the covenants in said lease binding upon it, and in this behalf defendant alleges that plaintiff failed, refused and neglected to make and deliver to defendant a full, true or correct accounting, quarterly or otherwise or at all, covering the net retail sales or general wholesale business done by plaintiff as provided for in said lease, although such accounting was many times demanded by defendant. Instead, over the written and oral protests of defendant, plaintiff furnished to defendant false, incomplete and incorrect so-called quarterly accountings of such sales which were, from time to time, rejected by defendant. By reason of such arbitrary and unreasonable breach by plaintiff of the terms and covenants of said lease on its part to be performed, defendant was unable to ascertain the true and correct amount of rental to be paid by plaintiff under the terms of said lease until the 24th day of October, 1949, upon which date the deposition of Dale Cockayne, manager for plaintiff of plaintiff's [22] Great Falls store was taken and his testimony perpetuated under the provisions of Sections 10687 to 10692 of the Revised Codes of Montana, 1935. By the testimony of said Cockayne, and the records of plaintiff introduced in evidence as a part of said deposition, it was disclosed that plaintiff was indebted to defendant for rental for the period 1947,

1948 and 1949 to October 19, 1949, in a sum in excess of \$5,161.00. Defendant admits that subsequent to March 1, 1944, and particularly during the years 1947, 1948 and 1949 plaintiff made net retail sales of farm equipment and other items, but specifically denies that said sales were had and obtained elsewhere than on the premises described in said lease, and in this behalf defendant alleges that said farm equipment and other items were advertised for sale by Gambles Store located upon said premises; the greater part of the sales of such equipment and items were initiated and consummated on said premises; all sales slips, contracts and moneys were handled by the business office located in said premises; all sales were made under the supervision of the manager of said store; and, said farm equipment and other items was treated and considered by plaintiff as a unit or department of its store located upon said premises, all as shown and disclosed by the records of plaintiff introduced in evidence in the deposition of Dale Cockayne, aforesaid. Admits that defendant claimed and now claims that it is entitled to an additional rental by reason of such sales, and that, therefore plaintiff is indebted to the defendant in a sum of money in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs. Denies that the exact sum claimed by defendant is not known to plaintiff. Specifically denies that plaintiff denies such claim of defendant, or that plaintiff contends that said sales of farm equipment and other items were not within the provisions of paragraph 2 of said lease,

and in this behalf defendant alleges that on or about the 24th day of October, 1949, the said plaintiff offered to pay to said defendant the sum of \$5,161.60 as and for [23] additional rental due defendant by reason of retail sales of such farm equipment and other items, which offer was by said defendant accepted, and that no controversy now exists or existed at the time of the filing of plaintiff's complaint with respect to such matter. Said sum of \$5,161.60 has not been paid by plaintiff to defendant.

#### IV.

Admits the allegations of paragraph IV.

#### V.

Admits that on October 3, 1949, the defendant sent a letter by registered mail to the plaintiff advising plaintiff that "under paragraph 16 of the lease, the term thereof is hereby declared terminated," a copy of which letter is attached to plaintiff's complaint as Exhibit "B." Admits that defendant has claimed and now claims that there has been for more than a year and that there now is a default in the payment of rent, and that it has declared said lease terminated, and in this behalf defendant alleges that on October 24, 1949, at Great Falls, Montana, the plaintiff was informed by defendant that said lease had been terminated and was no longer in force and effect; that defendant desired possession of the premises; that defendant desired immediate payment of the amount due it as additional rental for the premises described in said

lease; and that upon such payment by plaintiff to defendant, the defendant would consider negotiating with plaintiff for a new lease upon the premises. Plaintiff agreed to pay to defendant the rental due to defendant as disclosed by plaintiff's records in the amount of \$5,161.60. Thereupon plaintiff and defendant entered upon negotiations with respect to a new lease upon said premises. Such negotiations continued during the period October 24th, 25th, 26th, 27th and 28th. All of the terms of the new lease had been agreed upon on October 28th save and except the minimum rental to be paid by plaintiff to defendant. The representative of plaintiff who was conducting such negotiations then advised defendant that he would go to Minneapolis for [24] a meeting Saturday morning, October 29th, at which meeting he expected to iron out the minimum rental matter and that he would return to Great Falls on Monday, October 31st, and consummate said lease or resume negotiations on said rental matter. Said representative, William T. Hill by name, went to Minneapolis on October 28th and attended said meeting, but failed to return to Great Falls. On November 1st, the present action was filed and on November 1st at 4:19 p.m., the said Hill sent the following telegram to defendant:

“Proposals unsatisfactory therefore negotiations must cease.”

Under the facts set forth above, said plaintiff cannot and does not in good faith claim or assert that it has not defaulted in the payment of rent or of the other covenants of said lease dated December

27, 1943. Such claims and assertions are now foreclosed by the voluntary actions and admissions of the plaintiff. Nor can plaintiff now claim or assert in good faith that its defaults were the result "only of an honest and reasonable interpretation of said written lease." The defendant further alleges that the allegation that, "plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists," is not made in good faith for the reason that plaintiff has heretofore agreed to pay to defendant the sum of \$5,161.60 for rental due defendant, but now refuses to pay such agreed sum or any part thereof.

## VI.

Admits the allegations of paragraph VI.

## VII.

Answering paragraph VII, defendant denies that plaintiff makes and alleges that plaintiff cannot, in good faith, make the contentions set forth in said paragraph. Defendant further alleges that under the facts set forth in this answer there is no occasion for defendant to deny any such purported and fictitious contentions. [25]

## VIII.

Denies the allegations of paragraph VIII.

## IX.

Denies the allegations of paragraph IX. Defendant alleges that there is not any actual or justiciable controversy between plaintiff and defendant con-

cerning any of the matters set forth in said complaint or in the prayer thereof which this Court has the power or jurisdiction to adjudicate.

Wherefore, defendant prays judgment as follows:

1. That said action be dismissed upon the merits.
2. That defendant have and recover of and from the plaintiff, defendant's costs and disbursements incurred in and by reason of this action.

H. C. HALL,

EDW. C. ALEXANDER,

HOWARD C. BURTON,

Attorneys for Defendant.

Service admitted.

[Endorsed]: Filed November 4, 1949. [26]

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[Title of District Court and Cause.]

## OPINION

A declaratory judgment is sought in this suit with the purpose also of obtaining other relief and determining the relations of the parties under that certain written lease and agreement entered into between the plaintiff and defendant on December 27, 1943, by which the latter leased to the former those certain premises consisting of a one-story building and basement located at Nos. 521-523-525 Central Avenue, in the City of Great Falls, Cascade County, State of Montana, and further de-

scribed as having a frontage of seventy-five feet on Central Avenue; and such lease was made for the purpose of enabling the plaintiff to carry on a general mercantile business and to maintain and conduct on said premises a general department store.

The plaintiff had heretofore been engaged generally in the merchandising business and the defendant in conducting a real estate business. This is known as a percentage lease, and the plaintiff was to have possession of the premises on March 1, 1944, and continue thereunder for a period of ten years, the lease expiring by its terms on the last day of February, 1954; there was provision therein for a minimum base rental of \$5,400.00 per year, which was payable "in equal monthly installments of \$450.00 each in advance on the first day of every month during said term, beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of [389] merchandise to other Gamble Stores. Should lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales (of) Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00)

or on any general wholesale business done as provided for."

Aside from the quotation from paragraph 2 of the lease the next paragraph thereof which requires special attention is number 16, which reads in part as follows: "If default be made by lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the lessee, it shall be lawful for the lessor at the lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies that might otherwise be used for arrears of rent or preceding breach of covenants. \* \* \*"

Large sums of money were expended by both parties for remodeling and improvements, and thereafter the net retail sales increased, and aside from the regular rental payments each month the defendant received increased rental payments under the percentage clause of the lease. However, there were certain sales of farm implements and equipment made by lessee upon which the two per cent rental payment was never made, and which lessor claims were improperly withheld in violation of the express terms of the lease, and this

affords the principal cause of contention in this suit. The lessee asserts that the sales of farm implements and equipment were conducted from a building across the alley and on a separate lot from the department store on Central Avenue, and was established as a separate and distinct business that was not in contemplation by the parties at the time [390] the lease was executed and constituted no part of the rental agreement and therefore could not be included in the net retail sales to which the percentage clause applied. The lessor claims that all such retail sales were "had and obtained on the above-described premises," according to the evidence and terms of the lease, and the argument advanced in support of this contention in general is that the only Gamble Store operated in Great Falls was the department store at 521-523-525 Central Avenue and was conducted by one manager, who had charge of unit No. 5 of the store for sale of farm equipment, all advertising, display in store, approved credit sales and received all money. From the department store customers were taken to the place or places of storage of farm equipment, except when such implements or equipment were on display in the store, and in furtherance of the claim that sales made of farm implements and equipment were as much "had and obtained" upon the premises at the above numbers as any other sales made in the usual course of business, counsel for lessor has submitted a clear and succinct statement of the evidence in his brief which lends support to his argument. The evidence as shown by the statement

referred to and by the transcript is so plain and convincing that there seems to be no question how and where the sales and disposition of agricultural implements and accessories were "had and obtained."

Although counsel argue that farm equipment sales were not in contemplation at the time the lease was signed, there seems to be no point to that argument; the parties agreed to a percentage rental on all retail sales above \$270,000.00; there was no specification of sales of any particular kind or description of property sold, or to be sold, to which the rent would apply apart from the general provision. Without further discussion of this subject the court is of the opinion that there should have been included in computing the 2% on all retail sales over \$270,000.00. the amount of sales of farm implements and accessories; and to that extent the plaintiff would be indebted to defendant for additional rental.

The negotiations for a compromise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence [391] relating to this attempted compromise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of court herein. It would appear from the provisions of the statute and authorities (R.C.M. 1947, 93-2201-3) that evidence of com-

promise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise it is in evidence that no settlement occurred. (*Huffine v. Lincoln*, 53 Mont. 474.) In the strict sense of the word there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise.

In this cause plaintiff seeks from the court a declaration "of the rights and duties of the parties hereto under said written lease and the facts hereinabove set forth"; whether plaintiff owes defendant any rental; whether plaintiff is in default of the covenants; whether the lease is terminated and forfeited; whether defendant is entitled to immediate possession of said premises. How far can the court go in determining the questions submitted by plaintiff under the provisions of the Federal Declaratory Judgment Act, and the authorities relating to it, in this suit?

The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies, both at law and in equity, which the judiciary acts had already conferred. (*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227.) It is provided in the Declaratory Judgment Act that a declaration of rights may be awarded although no further relief be sought, and it is also provided therein that "further relief based on a declaratory judgment or decree may be granted whenever neces-

sary or proper." The following case is an authority in point:

"The jurisdiction of the District Court in the present suit praying an adjudication of rights in anticipation of their threatened infringement, is analogous to the equity jurisdiction in suits *qua timet* or for a decree quieting title. See *Nashville, C. & [392] St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 263. Called upon to adjudicate what is essentially an equitable cause of action, the District Court was as free, as in any other suit in equity, to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgment Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles." (*Great Lakes Co. v. Huffman*, 319 U. S. 293, 300.)

It appears to be well established that the discretion to grant or refuse declaratory relief should be liberally exercised to effectuate purposes of the Declaratory Judgment Act and thereby afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The remedy should not be accorded to try a controversy by piece-meal, to try particular issues without settling the entire controversy, or to interfere with an action already instituted. (*Aetna Casualty & Surety Co. v. Quarles*, 92 F.(2) 321; Jud. Code 274(d), 28 U.S.C.A. 400.) In another case it was held that the pleader may join claims for a declaration of

rights and claims for personal coercive relief. "It is not improper for a pleader under the Federal Rules of Civil Procedure to combine in one complaint a request for a declaration and for some coercive relief. Nor is it improper for a District Court to render a judgment or judgments granting both forms of relief." (Chase Nat. Bank v. Citizens Gas Co., 113 F.(2) 217, 230.) As illustrative of a controversy or dispute under the provisions of the Act, see Aetna Life Ins. Co. v. Haworth, 300 U. S. 227-242; Lehigh Coal & Navigation Co. v. Central R. of New Jersey, 33 F. Supp. 362-365; F. X. Hooper Co. v. Samuel M. Langston Co., 56 F. Supp. 577, 583.

A serious question relates to the alleged termination of the lease, and the construction and application of the forfeiture clause contained therein to the state of facts presented here. Defendant contends that it is entitled to a forfeiture because of the default of the plaintiff in payment of percentage rentals [393] on retail sales of farm equipment, percentage rentals on wholesale sales and in failure to furnish complete accounts and reports. The real bone of contention seems to be over the failure to pay the percentage rental on sales of farm equipment wherein a controversy has existed for sometime over the right of lessor to claim it, and for the determination of which this suit under the declaratory judgment act was instituted.

The plaintiff is conducting an established general merchandising business, with expanding operations and constantly increasing sales upon which the per-

centage rental applies, thereby increasing the rentals due the landlord as was contemplated by the parties in adopting this form of rental payments when the lease was executed. Many thousands of dollars have been expended by both lessor and lessee to equip the department store and to provide adequate facilities for its expanding business, and it would appear that both parties would suffer a severe loss if this lease were terminated, and the damage and inconvenience to plaintiff on a forced removal from the premises would be difficult to estimate, which is separate and apart from the probable loss to numerous wage earners who might lose employment.

Much has been said in the briefs on the subject of waivers, plaintiff claiming that the acceptance of rental payments after defendant had notified plaintiff of the termination of the lease amounted to a waiver; the payments referred to were the regular monthly rental of \$450.00 for October, 1949, and the quarterly rental of 2% on sales exceeding \$270,000.00 extending through August, 1949. The law generally seems to be that where any recognition is given to the existence of a tenancy after notice of termination of the lease or right of entry has accrued, wherein the lessor has notice of the forfeiture, will have the effect of a waiver of the landlord's right to a forfeiture of the lease; it was further held that slight acts on the part of lessor may be sufficient to effect a waiver. (32 Am. Jur. Sec. 882; 52 C.J.S. Sec. 724; Model Dairy Co. v. Foltis-Fischer, 67 F.(2) 704; Woppard v. Schaffer

Stores Co., Inc., 272 N. Y. 304.) But on the other hand, it appears that the \$450.00 rent for October, 1949, was due and payable the first of the month and the quarterly payment of 2% was due and [394] payable at the end of the August quarter, so that if such payments were made after the notice of termination of the lease, when both were due before that date, and received "on account" by defendant, it might indicate an intent on the part of defendant to hold to his notice of termination of lease, still claiming his 2% rental on sales of farm equipment, the subject of the present suit. Waiver is largely a question of intent, and from a consideration of the law and the facts, as they appear to the court, there is not sufficient evidence here to hold that defendant waived his intention to terminate the lease. (In re Wil-Lou Cafeterias, Inc., 95 F.(2) 306.)

However, something remains to be said by the court on the subject of forfeiture in this case. The plaintiff has quoted the special statute on the subject of relief from forfeiture (Sec. 17-102, R.C.M. 1947) which provides: "Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

Defendant replies to this citation by quoting a general statute (Sec. 58-423, R.C.M. 1947) relating

to the extinction of pecuniary obligations, which provides: "Extinction of pecuniary obligations. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or deposit within this state, of good repute, and notice thereof is given to the creditor."

Under the provisions of the special statute quoted the court has authority in a proper case to relieve from forfeiture upon making full compensation. In U. S. v. Forness, 37 F. Supp. 337, the court quotes with approval Davis v. Taylor, 51 App. D. C. 97, 276 F. 619, 621, which involved a controversy between a landlord and tenant concerning property located in the District of Columbia. The lease provided that if the rent was not paid within ten days of the due date the lease should wholly cease and determine. The [395] tenant had not paid the rent due but had tendered the sum due plus interest since that time. The court said: "Ever since the decision of the Supreme Court of the United States in Sheets v. Selden, 7 Wall. 416, 421, 19 L. Ed. 166, it has been the settled law of all federal jurisdictions, except where controlled by statute, that the payment of the rent due, with interest and costs, or the tender of them, before the execution of the judgment for possession, relieves against the forfeiture resulting from the default in the payment of rent. \* \* \* Interpreting the covenant of the lease in question in the light of the law, as we must do, it signifies that since the forfeiture provided for therein has the single purpose of the payment of

the rent the moment the rent, interest and costs are paid or tendered, provided this is done while the tenant is in possession, the forfeiture disappears. The debt having been paid there is no occasion for resorting to the security." In this connection see also Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166; Prout v. Roby, 82 U. S. 471, 15 Wall. 471; *In re Gutman*, D. C. 197 F. 472; Sechrist v. Bryant, 52 App. D. C. 286, 286 F. 456.

Plaintiff states in its complaint that it is ready, willing and able to make full compensation to defendant if any exists; full compensation here according to precedent would mean principal, interest and costs, which, as the court understands it from the complaint and interpretation thereof in the briefs of counsel for plaintiff, is tendered to defendant in the event of failure to sustain the allegations of the complaint.

On the main proposition in this suit, the demand for a declaratory judgment on the percentage of sales of farm implements and parts, the defendant has won so far as this court is concerned but not in respect to its claim of forfeiture; the only complaint remaining for consideration concerns the tardiness and brevity in accountings and reports.

From the testimony it appears that no audit of actual sales reports was ever refused, nor was access to the books of plaintiff, and that during the first four years of the lease practically the same method of accounting had been pursued by plaintiff without serious complaint by defendant, and plaintiff asserts that any [396] objections made were

considered and complied with to a reasonable extent, and that it is only during the latter years of the lease that demands have been made for a change in accounting and for more information in detail. Plaintiff admits the error made in the fifth year of the lease and explained how it occurred and corrected it; that any other mistakes that might have been made were adjusted long prior to October 3rd, 1949, when defendant gave notice of the termination of the lease.

There appears to be no claim for a percentage rental on wholesale business nor on the transfer of merchandise to other Gamble Stores.

The decision of the court will be in accordance with the views herein expressed. Findings and conclusions may be submitted under the rule. Costs will go to defendant as heretofore indicated. Form of judgment may be submitted. Exceptions allowed counsel.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed February 15, 1951. [397]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause came regularly on for trial before the Honorable Charles N. Pray, Judge of the above-entitled Court, sitting without a jury, on

the 27th day of December, 1949, Carter Williams, Esq., and Bjarne Johnson, Esq., appearing as counsel for the plaintiff and H. C. Hall, Esq., and Edw. C. Alexander, Esq., appearing as counsel for the defendant. Both parties having announced themselves ready for trial, evidence both oral and documentary was introduced by plaintiff and defendant and both parties having announced that they rested their respective cases, and both parties having moved for judgment, the case was ordered submitted upon the evidence, the motions for judgment and upon briefs to be prepared and submitted by counsel for the respective parties. The Court, having considered the evidence and briefs of counsel, and being duly advised in the premises, rendered its decision and opinion on the 15th day of February, 1951, reference to which decision and opinion is hereby made as though fully set forth herein.

Now, Therefore, by reason of such decision and opinion, and upon the evidence and the law, the Court makes the following [398]

### Findings of Fact

#### I.

Plaintiff, Gamble-Skogmo, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business in Minneapolis, Minnesota. Defendant, McNair Realty Company, is a corporation, organized and existing under and by virtue of the laws of the State of Montana, having

its principal office and place of business at Great Falls, Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## II.

On December 27, 1943, upon a printed lease form provided by the plaintiff and prepared by agents of the plaintiff, the defendant leased to the plaintiff a one-story building and basement situated on the West half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Cascade County, Montana, known as 521-523-525 Central Avenue, for the period from March 1, 1944, to and including the last day of February, 1954. A copy of which printed and written lease is attached as Exhibit "A" to plaintiff's Complaint and was introduced in evidence as Plaintiff's Exhibit No. 1. Said lease, among other things, provided as follows:

That the lease was given to plaintiff

"for the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith."

"Time is the essence of this lease and all the provision hereof."

"In consideration of the demise and leasing of the premises aforesaid by said Lessor, the Lessee agrees to pay to the Lessor at such place as shall be designated by the Lessor from time to time in writing or to such other Payee as the Lessor shall designate by written instru-

ment duly acknowledged, as rental for said demised premises during said term a rental at the rate [399] of Fifty-Four Hundred and No/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.

“Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the Lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for.”

### III.

Prior to March 1, 1944, the plaintiff took possession of said leased premises under said lease and at all times since has been occupying said premises for the purpose of selling merchandise and other business that could be conveniently carried on in connection therewith.

## IV.

Commencing on or about January 1st, 1947, and continuing to on or about the 23rd day of December, 1949, the plaintiff made net retail sales of farm equipment and other associated items in a total amount of \$258,883.49. With respect to such net retail sales the Court specifically finds that all thereof were "had and obtained" upon the store premises located at 521-523-525 Central Avenue in the City of Great Fall, Montana. Upon this matter the Court finds from the evidence:

That in the operation of its chain of stores the plaintiff sets up various units or departments. From the record herein it appears that there are five of such departments. Apparently some stores have, within their operations, all five departments. Others have one or more. The departments so maintained are as follows:

Unit 1—The department store selling general merchandise;

Unit 2—Food dispensing; [400]

Unit 3—Drug Store;

Unit 4—(Not shown in the record);

Unit 5—Farm implements, parts and repairs.

At the outset the only department placed in operation in Great Falls was Unit 1, the department store. Thereafter Unit 2 was installed and was in operation at the time of trial. Unit 5 was installed on or about January 1st, 1947, and continued in operation until December 23rd, 1949, when it ceased operations.

That an analysis of the methods used in conducting the store operations discloses that the sales made by the Farm Store were as much "had and obtained" upon the premises at 521-523-525 Central Avenue as any other sales made by the store in the usual course of its business operations. Thus it appears that:

- (1) There was but one "Gamble Store" operating in Great Falls, and there was but one manager of the entire operations of that store.
- (2) This one store was divided into three units or departments, each of which was a part of the "Gamble Store."
- (3) The manager of the "Gamble Store" received a commission on all sales made in the three departments of the store.
- (4) The business office, and the office of the manager was located in the building at 521-523-525 Central Avenue.
- (5) In this business office all of the accounting and bookkeeping for the three departments was handled.
- (6) All petty cash used by the farm department in making change was supplied by the business office.
- (7) All moneys received through sales made in the farm department were deposited with the business office either immediately or at the close of the day's business.

(8) All sales records whether on credit or for cash were kept in the business office.

(9) All credit sales were approved by the business office. [401]

(10) All contracts for conditional sales were approved by the business office.

(11) There was but one bank account maintained for the entire store operation. All moneys received from sales in all departments went into that bank account. All salaries were paid from that bank account.

(12) All other expenses of operating the farm department were paid out of the business office.

(13) The only telephone available was the telephone in the premises at 521-523-525 Central Avenue. There was no other telephone listed for Gamble's Store.

(14) In all advertising, whether for farm implements or otherwise, the prospective customer was directed to go to the store at 521-523-525 Central Avenue, and the only telephone number given was the telephone at the store on Central Avenue.

(15) The advertisements offered and received in evidence all disclose that farm implements were invariably advertised as being for sale at the Central Avenue Store.

(16) Brochures and other pamphlets advertising farm machinery and implements were kept in the

Central Avenue Store for the benefit of prospective customers.

(17) When, in response to a newspaper advertisement or otherwise, a customer came into the store and evinced an interest in farm implements he was then directed to the store across the alley.

(18) From the advertisements introduced in evidence as exhibits 8 to 15, inclusive, it appears that farm implements were actually displayed and sold in the "down-stairs" store of the premises at 521-523-525 Central Avenue.

(19) Actually a tractor was displayed for sale on the main floor of the Central Avenue premises.

(20) As conclusively appears from the store records introduced in evidence as exhibits 27 and 28, all sales and expenses of [402] departments 1, 2 and 5 were considered as the sales and expenses of "Gamble's Store"; although for bookkeeping purposes the sales were separated and a bookkeeping charge made against such sales in order "to see if any particular unit is operating at a loss."

(21) There was no complete separation of the farm unit or department from the other store operations. Indeed, the operations were so intermingled as to make it impossible to separate one from the other. Thus, while the premises across the alley were called the "farm store," nevertheless it has at all times been also used as a warehouse for furniture and other items sold directly from the premises on Central Avenue.

## V.

The defendant, at all times has claimed that the plaintiff, under the terms of its lease, was required to pay to defendant a 2% additional rental upon all net retail sales made as aforesaid by the farm unit or department of the "Gamble's Store," but the plaintiff has at all times denied such claim, and has at all times refused to account quarterly or otherwise to defendant for any retail sales made, as aforesaid, by said farm unit, and has at all times since January 1st, 1947, refused to pay, quarterly or otherwise, to defendant the 2% additional rental arising out of such retail sales.

## VI.

The plaintiff is indebted to the defendant for additional rental arising out of the net retail sales of said farm unit or department as follows:

1. For the quarter ending February 28, 1947 .....	\$ 22.34
2. For the quarter ending May 31, 1947 .....	\$ 539.13
3. For the quarter ending August 31, 1947 .....	\$ 903.75
4. For the quarter ending November 30, 1947 .....	\$ 74.72
5. For the quarter ending February 28, 1948 .....	\$ 317.46
6. For the quarter ending May 31, 1948 .....	\$ 984.76

7. For the quarter ending August 31, 1948 .....	\$1597.24
8. For the quarter ending November 30, 1948 .....	\$ 82.04
9. For the quarter ending February 28, 1949 .....	\$ 27.34
10. For the quarter ending May 31, 1949 .....	\$ 233.33
11. For the quarter ending August 31, 1949 .....	\$ 324.21
12. For the quarter ending November 30, 1949 .....	\$ 68.14
13. For the period November 30, 1949, to December 27, 1949 .....	\$ 3.24

## VII.

By reason of the refusal of the plaintiff to account to defendant for such net retail sales of the farm department or to pay to defendant the additional rental due to defendant under the terms of the lease, arising out of such sales, said plaintiff breached the terms and provisions of such lease, and at the time of the filing of plaintiff's Complaint, and at the time of the trial of this action said plaintiff was in default in the payment of rent reserved for more than two consecutive rental periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason [404] of such defaults said lease

was on October 3rd, 1949, and has been at all times since, subject to termination by defendant.

### VIII.

On October 3rd, 1949, by reason of the defaults of plaintiff, aforesaid, the defendant gave to plaintiff written notice of the termination of the lease, and on October 10th, 1949, defendant demanded of plaintiff a surrender of the leased premises to defendant which demand was refused by plaintiff.

### IX.

The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof.

### X.

In its Complaint herein the plaintiff alleges that "the plaintiff is ready, willing and able to make full compensation to the defendant" for its default in the payment of rent, if any such default be found by the Court, and, plaintiff through its agent, at the trial of the action, agreed that the plaintiff was "ready, willing and able to make full compensation for that rent with interest, costs and damages" in the event that this Court decided that plaintiff was in default.

### XI.

By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plain-

tiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereinafter set forth.

## XII.

The amount of compensation to be paid by plaintiff to defendant shall be as follows: The sum of \$5,931.18 principal and [405] interest, constituting the rental due defendant as herein set forth with interest thereon at 6% per annum, together with interest on said sum at 6% per annum until paid; the further sum of \$362.25 taxed as costs in this case with interest thereon at 6% per annum until paid. The Court further finds that by reason of the filing of this action and the trial thereof the defendant was required to and did procure the services of attorneys, and is obligated to compensate such attorneys for their services.

Wherefore, by reason of the foregoing Findings of Fact the Court makes the following

## Conclusions of Law

### I.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is indebted to the defendant in the sum of \$5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, to-

gether with interest upon such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of \$5,931.18.

## II.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is in default with respect to the covenants contained in said lease relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff.

## III.

The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease, [406] unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein.

## IV.

That the defendant, McNair Realty Company, a corporation, is entitled to recover from plaintiff

its costs and disbursements herein incurred in the sum of \$362.25, with interest thereon at the rate of 6% per annum from February 15th, 1951.

## V.

Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period.

## VI.

The Court further retains jurisdiction to consider the question whether after judgment in this cause shall have become final, the defendant is entitled to recover from plaintiff the reasonable fees of defendant's attorneys which defendant has become obligated to pay by reason of this action. Such matter shall be determined by the Court after petition for the allowance of such attorneys' fees filed and served by defendant, and hearing thereon by the Court.

Dated this 24th day of February, 1951.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed February 24, 1951. [407]

In the District Court of the United States for the  
District of Montana, Great Falls Division

Civil No. 1195

GAMBLE-SKOGMO, INC., a Corporation,

Plaintiff,

vs.

McNAIR REALTY COMPANY, a Corporation,

Defendant.

**JUDGMENT**

The Court having heretofore and on the 24th day of February, 1951, duly made, filed and entered its Findings of Fact and Conclusions of Law in the above cause, reference to which is hereby made, and it now appearing to the Court that the plaintiff above named has tendered to the defendant the sum of \$6,305.20 as required by said Findings and Conclusions as compensation to defendant, other than by way of attorneys' fees,

Now, Therefore, It Is Hereby Decreed, Adjudged and Declared:

1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail

sales made by plaintiff for the period January 1st, 1947, to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.

2. By reason of such defaults the defendant was entitled, [408] under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949.

3. That by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease; provided, however, that this Court reserves and retains jurisdiction of said cause for the purpose of determining and adjudging, after petition filed and hearing thereon, whether defendant is entitled to recover from plaintiff, in addition to the sums above set forth, the reasonable fees which defendant has become obligated to pay its attorneys by reason of the filing and prosecution of this action.

4. That defendant have and recover of and from

plaintiff defendant's costs herein incurred amounting to and taxed at the sum of \$362.25.

Dated this 14th day of March, 1951.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed and entered March 14, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that McNair Realty Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on the 15th day of March, 1951, to wit: that portion of said judgment that Orders, Adjudges and Decrees,

"3. That by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease."

Dated this 23rd day of March, 1951.

H. C. HALL,

EDW. C. ALEXANDER,

HOWARD C. BURTON,

Attorneys for Defendant and  
Appellant.

[Endorsed]: Filed April 2, 1951. [410]

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[Title of District Court and Cause.]

### UNDERTAKING ON APPEAL

Know All Men by These Presents:

That we, McNair Realty Company, a corporation, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Gamble-Skogmo, Inc., a corporation, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Gamble-Skogmo, Inc., a corporation, its attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 23rd day of March, 1951.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court designated as Civil No. 1195, between Gamble-Skogmo, Inc., a corporation, plaintiff and McNair Realty Company, a

corporation, defendant, judgment was duly made, given and entered, and the said McNair Realty Company, a corporation, having filed with the said District Court a notice of appeal as provided by the Rules [412] of Civil Procedure.

Now, the condition of the above obligation is such, that if the said McNair Realty Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, or if the appeal is dismissed on the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal] MCNAIR REALTY COMPANY,  
A Corporation,

By /s/ C. S. MCNAIR,  
President.

[Seal] UNITED STATES FIDELITY  
AND GUARANTY  
COMPANY,

By /s/ JOHN W. JACOBUS,  
Attorney in Fact.

Countersigned:

B. P. MCNAIR CO.,

By /s/ FLORENCE L. KALIA,  
Montana Licensed Agent.

[Endorsed]: Filed April 2, 1951. [413]

[Title of District Court and Cause.]

### NOTICE OF CROSS-APPEAL

Notice is hereby given that Gamble-Skogmo, Inc., a corporation, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on the 14th day of March, 1951, to wit:

That portion of said judgment which Orders, Adjudges and Decrees:

“1. The plaintiff was, at the time of the filing of its complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947, to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.”

“2. By reason of such defaults the defendant was entitled under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10, 1949.”

"4. That defendant have and recover of and from plaintiff defendant's costs herein incurred amounting to and taxed at the sum of \$362.25."

Dated this 13th day of April, 1951.

I. W. CHURCH,

G. G. HARRIS,

BJARNE JOHNSON,

CARTER WILLIAMS,

Attorneys for Plaintiff and  
Cross-Appellant.

[Endorsed]: Filed April 13, 1951. [422]

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[Title of District Court and Cause.]

### UNDERTAKING ON CROSS-APPEAL

Know All Men by These Presents:

That we, Gamble-Skogmo, Inc., a corporation, as Principal, and American Casualty Company of Reading, Pennsylvania, as surety, are held and singly bound unto McNair Realty Company, a corporation, in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said McNair Realty Company, a corporation, its attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents;

Sealed with our seals and dated this 13th day of April, 1951.

Whereas, lately at a session of the District Court

of the United States for the State of Montana in a suit pending in said Court designated as Civil No. 1195 between Gamble-Skogmo, Inc., a corporation, Plaintiff, and McNair Realty Company, a corporation, Defendant, judgment was duly made, given and entered and the said Gamble-Skogmo, Inc., a [424] corporation, having filed with the said District Court a notice of Cross-Appeal as provided by the rules of civil procedure,

Now, Therefore, the condition of the above obligation is such that if the said Gamble-Skogmo, Inc., a corporation, shall prosecute its said Cross-Appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, or if the Cross-Appeal is dismissed on the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

GAMBLE-SKOGMO, INC.,  
A Corporation.

By CARTER WILLIAMS,  
Attorney for Plaintiff.

[Corporate Seal]

AMERICAN CASUALTY  
COMPANY OF READING,  
PENNSYLVANIA.

By J. W. SOGARD,  
Attorney in Fact.

[Endorsed]: Filed April 13, 1951. [425]

[Title of District Court and Cause.]

TENDER OF PAYMENT

To: McNair Realty Company and H. C. Hall and  
Edw. C. Alexander, its attorneys:

Pursuant to and in conformity with the Findings of Fact and Conclusions of Law heretofore filed in the above-entitled matter, we hand you herewith the sum of Five Thousand Nine Hundred Thirty-one and 18/100 (\$5,931.18) Dollars representing compensation to be paid by Plaintiff to Defendant; the sum of Three Hundred Sixty-two and 25/100 (\$362.25) Dollars representing costs and the further sum of Eleven and 77/100 (\$11.77) Dollars which we calculate to be the interest due in this matter from date of entry of Findings of Fact and Conclusions of Law up to the present date.

Dated the 6th day of March, 1951.

CHURCH, HARRIS,  
JOHNSON & WILLIAMS,

By BJARNE JOHNSON,  
Attorneys for Plaintiff  
Gamble-Skogmo, Inc.

Proper tender of the sum of \$6305.20 is hereby acknowledged and such tender is hereby refused.

HALL, ALEXANDER &  
BURTON,

By H. C. HALL,  
Attorneys for Defendant.

[Endorsed]: Filed March 6, 1951. [426]

[Title of District Court and Cause.]

## DESIGNATION OF POINTS TO BE RELIED UPON BY APPELLANT

Whereas, McNair Realty Company, a corporation, has perfected an appeal to the United States Court of Appeals for the Ninth Circuit from a portion of a judgment and decree made and entered in the above cause on the 15th day of March, 1951, and has served its designation of the portions of the record in said District Court to be transmitted to said Court of Appeals.

Now, Therefore, said appellant now designates the following points upon which it intends to rely upon said appeal:

1. The judgment and decree of the District Court is erroneous in so far as it adjudges that by the tender of the sum of \$6305.20 with interest to the defendant the plaintiff is entitled to be and is relieved from the termination and forfeiture of the lease between plaintiff and defendant dated December 27th, 1943, and is entitled to remain in possession of the leased premises.

2. The District Court failed to give effect to the following provision of the lease between plaintiff and defendant:

“16. If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein [419] contained to be kept by the Lessee, it shall be

lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to reposess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

3. The District Court failed to give effect to the following provision of the lease between plaintiff and defendant:

"Time is the essence of this lease and all the provisions hereof."

4. The District Court having expressly adjudged that "the plaintiff was, at the time of filing its complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1, 1947, to August 31, 1949," erred in adjudging that plaintiff was entitled to be relieved from a termination of the lease under the provisions of Section 17-102, Revised Codes of Montana, 1947.

5. The District Court having expressly adjudged

that "by reason of such defaults the defendant was entitled, under the term of the lease, to declare the lease terminated on October 3, 1949, and was entitled to the possession of the leased premises on October 10, 1949," erred in adjudging that plaintiff was entitled to be relieved from such termination under the provisions of Section 17-102, Revised Codes of Montana, 1947.

6. The refusal of the plaintiff to make a quarterly accounting to defendant of all net retail sales was intentional and wilful.

7. The refusal of the plaintiff to pay a percentage upon net retail sales made by its farm unit or department was intentional and [420] wilful.

8. Under the evidence the District Court was without jurisdiction to relieve the plaintiff from a termination of the lease according to its express provisions.

Dated this 4th day of April, 1951.

McNAIR REALTY COMPANY,  
a Corporation,

By H. C. HALL,

EDW. C. ALEXANDER,  
Its Attorneys.

Service admitted.

[Endorsed]: Filed April 4, 1951. [421]

[Title of District Court and Cause.]

**DESIGNATION OF POINTS TO BE RELIED  
UPON BY APPELLEE AND APPELLANT  
ON CROSS-APPEAL**

Whereas, Gamble-Skogmo, Inc., a corporation, has perfected a cross-appeal to the United States Court of Appeals for the Ninth Circuit from a portion of a judgment and decree made and entered in the above-cause on the 14th day of March, 1951, and has served its designation of the portions of the record in said District Court to be transmitted to said Court of Appeals.

Now, Therefore, the said appellant on cross-appeal now designates the following points upon which it intends to rely upon said cross-appeal.

1. The judgment and decree of the District Court is erroneous insofar as it adjudges that at the time of the filing of its complaint the plaintiff was in default with respect to the covenants contained in the lease of December 27, 1943, relating to the payment of rental and to the quarterly accounting required to be made by the plaintiff to the defendant covering net retail sales made by plaintiff for the period January 1, 1947, to [432] August 31, 1949.

2. The judgment and decree of the District Court is erroneous insofar as it adjudges that as of September 23, 1949, the plaintiff was indebted to the defendant for unpaid rental in the sum of \$5,177.70 in that of December 23, 1949, the plaintiff

did not owe the defendant anything for unpaid rental.

3. The sales of farm machinery and equipment were had and obtained on two other premises other than the demised premises and were not "had and obtained" on the demised premises.

4. By their acts and correspondence, both the plaintiff and the defendant placed a practical construction upon the lease of December 27, 1943, to the effect that sales of farm machinery and equipment were not included within the provisions of the lease of December 27, 1943.

5. The plaintiff was not in default of any of the terms of the lease of December 27, 1943, on the date of October 3, 1949, nor at the time of the filing of the plaintiff's complaint.

6. The judgment and decree of the District Court is erroneous insofar as it adjudges that by reason of certain defaults the defendant was entitled under the terms of the lease to declare the lease terminated on October 3, 1949, and that the defendant was entitled to the possession of the leased premises on October 10, 1949.

7. If the plaintiff is in default under the terms of lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24th to October 28th, inclusive, in 1949, the tender made in the plaintiff's

complaint, and the tender made by the plaintiff's representative during the course of [433] the trial.

8. If the final decision of this case is to the effect that the plaintiff is in default under any of the terms of the lease of December 27, 1943, the plaintiff once again hereby offers to make full compensation to the defendant for any such default or defaults and hereby offers to pay to the defendant the full amount of the principal, interest and costs, and to do all else that law and equity requires to prevent a forfeiture and termination of the lease.

9. In addition to the provisions of Section 17-102, Revised Codes of Montana, 1947, plaintiff is also entitled to be relieved from forfeiture in the event of default because the strict enforcement of the forfeiture or termination clause would be unjust, oppressive, and contrary to the general principles of equity.

10. The opinion and order of the District Court is erroneous insofar as it excluded from the case any evidence of a tender of full compensation made by the plaintiff to the defendant during the period of time from October 24th to October 28th, inclusive, 1949.

11. The District Court erred in retaining jurisdiction for the purpose of determining whether or not the plaintiff was obligated to pay to the defendant a sum for defendant's reasonable attorneys' fees in that the defendant is not entitled to recover for its attorneys' fees in this action.

12. The judgment and decree of the District Court is erroneous insofar it adjudges that the defendant have and recover from the plaintiff the defendant's costs which were taxed at the amount of \$362.25. [434]

13. The defendant waived its rights, if it ever had any, to demand a quarterly accounting on a net retail sales of farm machinery and equipment and to claim a 2% rental on said sales.

14. The defendant waived its rights, if it ever had any, to enforce the forfeiture or termination of the lease of December 27, 1943.

Dated this 17th day of April, 1951.

I. W. CHURCH,

G. G. HARRIS,

BJARNE JOHNSON,

CARTER WILLIAMS,

Attorneys for Gamble-Skogmo, Inc., a Corporation.

Service admitted.

[Endorsed]: Filed April 17, 1951. [435]

[Title of District Court and Cause.]

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Be it Remembered, That the above-entitled cause came on regularly for hearing in the District Court of the United States, in and for the District of Montana, Great Falls Division, in the Federal Building at Great Falls, Montana, on December 27th, 28th and 29th, 1949, before the Honorable Charles N. Pray, Judge Presiding, without a jury.

Whereupon, the following proceedings were had and done, to wit:

\* \* \*

Mr. Williams: Plaintiff Gamble-Skogmo, Inc., is ready, your Honor.

Mr. Hall: The defendant is ready, your [27\*] Honor.

\* \* \*

### DALE COCKAYNE

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Williams:

- Q. What is your name?
- A. Dale Cockayne.
- Q. Where do you reside, Mr. Cockayne?
- A. 117 - 28th Street South.
- Q. In Great Falls, Montana?
- A. Great Falls, yes. [28]

\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Dale Cockayne.)

Q. What is your present occupation?

A. Manager of the local Gamble Store.

Q. Is that a store operated by Gamble-Skogmo, Inc., the plaintiff in this action? A. Yes, sir.

Q. How long have you been manager of the Gambles' Store?

A. Here in Great Falls since September of 1947.

Q. What was your occupation prior to that?

A. Store opening work.

Q. And what does that consist of?

A. Opening new accommodation stores as we term them, any new department stores.

Q. For whom did you do that work?

A. For Gamble-Skogmo.

Q. Out of what office did you work?

A. Out of the Minneapolis office.

Q. Have you ever managed any other stores?

A. Yes, sir, I managed the store at Wishaskie, Wisconsin, and also the store at Seldon, Iowa.

Q. Have you ever been an assistant manager in a store?

A. Yes, sir, Sioux Falls, South Dakota.

Q. How long have you been employed by the plaintiff?

A. Ten years on April 18th of 1950.

Q. How many of those years did you work out of the headquarters offices in Minneapolis?

A. Two years. [29]

Q. Does the plaintiff Gamble-Skogmo own other stores? A. Yes, sir.

Q. Do they operate other stores?

(Testimony of Dale Cockayne.)

A. Yes, they do, Gamble Stores, West Coast Supply Stores, and McLeod Stores in Canada.

Q. Approximately how many years has the plaintiff Gamble-Skogmo, Inc., been in the merchandising business? A. Twenty-five years.

Q. Now, in the operations in Great Falls which you are in charge of does the plaintiff own any real property? A. No, sir, we don't.

Q. How did you carry on your operations in Great Falls in respect to property?

A. By leasing the same.

Q. What properties do you lease?

A. The department store from McNair Realty Company.

Q. Is that the premises known as 521, 523 and 525 Central Avenue? A. Yes, sir, it is.

Q. You refer to that as a department store, do you? A. Yes, sir.

Q. Is that the property involved in the present lawsuit? A. Yes, sir, it is.

Q. Is there a written lease on that property?

A. Yes, sir, there is.

Q. With whom is it entered into? [30]

A. With the McNair Realty Company.

Q. Is that the lease involved in this lawsuit?

A. Yes, sir, it is.

Mr. Williams: If the Court please, that lease is set forth at length in the complaint as Exhibit A, and it is admitted by the defendant that was the lease entered into and that it is true and correct. I doubt if we have to introduce in evidence the original of that lease; however, it occurs to me that

(Testimony of Dale Cockayne.)

the Court may wish to have that introduced in evidence since the original lease was made on a regular lease form made by Gamble-Skogmo, Inc.

The Court: There is no difference as to the contents, is there, of the copy attached to the complaint and the original lease?

Mr. Williams: There is no difference in the contents but part of the original lease has had things typed in the blank spaces and additional rental provisions.

The Court: What have you to say about that, Mr. Hall? Have you agreed that the copy attached to the complaint is sufficient, is the exact lease and contains the exact terms of the original lease?

Mr. Hall: I don't think there is any question about that, your Honor, but I think it would be helpful in showing that this is a Gamble-Skogmo form partially printed with blank spaces filled in by typing and shows approval by [31] some officer.

The Court: I suppose there are duplicate originals of that lease?

Mr. Hall: That is right.

The Court: That is how you know the copy is correct?

Mr. Hall: Yes, your Honor.

The Court: As far as the contents are concerned.

Mr. Hall: Yes, your Honor.

The Court: Well, you might introduce that original lease so that would show exactly how the form is prepared and what insertions were made and what it pertains to.

(Testimony of Dale Cockayne.)

Mr. Williams: I have in my hand a document marked Plaintiff's Exhibit 1, which purports to be the original or one of the originals of the lease entered into on the 27th day of December, 1943, between McNair Realty Company and Gamble-Skogmo, Inc. Will you stipulate that that is an original of the lease in question?

Mr. Hall: We have no objection, your Honor.

The Court: Very well, it may be introduced in evidence, if you offer it.

(Whereupon, said Plaintiff's Exhibit No. 1, offered and received in evidence, is in words and figures as follows, to wit:)

[Exhibit No. 1 is identical with Exhibit A to the Complaint, supra, pages 9 to 24 inclusive.] [32]

\* \* \*

Q. (By Mr. Williams): In addition to the written lease on the department store at 521, 523, 525 Central Avenue does the plaintiff lease other property in Great Falls, Montana?

A. Yes, we lease two other properties in Great Falls, one from the McNair Realty Company and one from the Roy Anderson Company.

Q. What is the other property you lease from the McNair Realty Company?

A. A warehouse and a lot behind our department store and the property—— [33]

\* \* \*

(Testimony of Dale Cockayne.)

Q. You do, however, know that you lease other property [34] from McNairs on First Avenue North, is that correct? A. Yes, sir.

Q. What is the situation as to the other property you lease in Great Falls, Montana?

A. We do lease some other property from the Roy Anderson Company at Ninth Avenue and 23rd Street, North.

Q. Do you pay rent for that property?

A. Yes, sir, \$180.00 a month.

Q. What rent do you pay for the property leased from the McNair Realty Company?

A. \$90.00 a month.

Q. Has the rent always been \$90.00 a month on that particular piece of property?

A. No, when we first rented from them it was \$60.00; it was raised to \$90.00 about a year ago.

Q. What is the situation of the Gamble Stores here in Great Falls as to their division into units, are they divided into units?

A. Yes, sir, they are. Unit 1 is known as the department store; unit 2 is food dispensing; and unit 5 is farm store.

Q. Where is unit 2 located? Where is the department store located?

A. 521, 523, 525 Central.

Q. What is sold in that store? [35]

A. Merchandise that would commonly be sold in a department store, such as clothing, hardware, furniture, and clothing of all types.

Q. What is your unit 2?

(Testimony of Dale Cockayne.)

A. It is food department or luncheonette.

Q. Where is that located?

A. That is located in the right-hand corner of the department store in the back of the building.

Q. What is your unit 5?

A. Unit 5 is farm implements and parts for those farm implements.

Q. What do you mean when you say farm implements?

A. Items manufactured by the Cockshutt Manufacturing Company, such as combines, seeders, mowing machines, rakes and all types and kinds of farm implements.

Q. Where is the farm store located?

A. In the back of the department store in the building rented from the McNair Realty Company.

Q. Now you say in the back of the department store; do you mean on the same premises as the department store?

A. No, of the building that would probably be 520 First Avenue North.

Q. Do you have any of your farm equipment or parts on the premises leased under this written lease which is Exhibit 1?

A. No, sir, we do not. [36]

Q. Have you ever, during the period you were manager, had any of the farm implements or parts either stored or displayed in the department store?

A. No, sir, we haven't. The implements, of course, it would be impossible to get them in the

(Testimony of Dale Cockayne.)

store, and the parts are housed across at 520 First Avenue North property.

Q. I understand that you stated that you were working for the plaintiff in 1943; is that correct?

A. Yes, sir, I was.

Q. Were you working for the plaintiff in December of 1943? A. Yes, sir.

Q. Where were you working at that time?

A. Sioux Falls, South Dakota.

Q. Were you acquainted with the general Gamble organization at that time? A. Yes, sir.

Q. Was the plaintiff involved in the sale of farm implements in December, 1943? A. No, sir.

Q. Was it involved in the sale of farm implements anywhere in the United States in December, 1943? A. Not to my knowledge.

Q. Would you have known if it were?

A. Yes, sir.

Q. I take it from that, then it was not involved in the sale of farm implements in Great Falls in December, 1943; is that correct?

A. That is correct, sir.

Q. I understand that your farm implements are classified [37] as unit 5; was there a unit 5 at any time during 1943 in the Gambles organization?

A. No, sir, there was not.

Q. When did the plaintiff first go into the farm machinery merchandising?

A. 1945 some time.

Q. How many sales units were there in Great

(Testimony of Dale Cockayne.)

Falls when the Gamble Store first opened here in March of 1944? A. Just one.

Q. When was unit 2 added?

A. In November of 1946.

Q. When was the farm store added?

A. January of 1947.

Q. I understand that you didn't come until September, 1947, to the Gamble Store in Great Falls, is that right? A. Yes, sir, it is right.

Q. Then how do you know that the unit farm store was started prior to the time you arrived?

A. Because of the monthly statements. In other words, January was the first month that there was a statement for it of 1947, and one of the purposes in having these various units is to know exactly what the profit or loss is on them, and in January, 1947, is when the first unit 5 statement appears.

Q. Are these statements made here in the local Gamble Store?

A. No, sir, they are not. They are made from the sales [38] figures and expenses we send in from the store here.

Q. Are they made in the regular course of business of Gamble-Skogmo, Inc.?

A. Yes, sir. The sales figures and expenses are sent from here to Denver and there the monthly statements are prepared.

Q. Is it a requirement of the company that these figures be prepared? A. Yes, sir.

Q. When Gamble-Skogmo, Inc., first started to

(Testimony of Dale Cockayne.)

sell farm implements in Great Falls, early in 1947, what premises were used for these sales?

A. From land that was rented from International Harvester Company, and also the lot that is rented from the McNair Company on First Avenue North.

Q. Is that disclosed by your records?

A. Yes.

Q. Since you have been manager where have the farm implements and parts been stored or displayed?

A. In the building rented from the McNair Company on First Avenue North, and from the building rented from the Roy Anderson Company on 23rd and 9th Avenue North.

Q. Is the plaintiff still in the business of selling farm implements and parts in Great Falls, Montana? A. No, sir, we are not.

Q. When did you cease the operation of your farm store? A. About thirty days ago. [39]

Q. What was the reason that you stopped operating a farm store?

A. We were unable to get the proper type of buildings, etc., and with the present lease difficulties that we are having it would make it prohibitive to operate it.

Q. Do you understand that McNair Realty Company, the defendant here, is claiming a 2% rental under the lease agreement which is introduced in evidence as Plaintiff's Exhibit 1?

A. Yes, sir.

(Testimony of Dale Cockayne.)

Q. Now, will you tell the court, the normal manner in which farm sales were conducted during the time that you were the manager here?

A. Well, the number one thing there, of course, before anybody buys an implement or any item of a large dollar volume he is naturally interested in seeing that item. In many cases he is also interested in seeing the item work. So in order to tell the court what took place it would almost be necessary to use the two examples, one on where the item was delivered to the customer's place of business, ranch or farm, whatever you want to term it, and there the item is put to use and if it proves to his satisfaction, the sale was completed. The other one would be for a smaller item such as a mowing machine, rakes, items of that nature are not always demonstrated before they are sold. In that case, the man would be taken up to the Roy Anderson lot, or to the McNair lot on First Avenue North, [40] depending on where the item was located, and there shown the item and, of course, told of the merits that it has and the sale completed. In the case of parts he would go to the building on First Avenue North and there secure the parts. Is that complete enough?

Q. Has it ever been possible for a prospective purchaser to examine any of the merchandise sold by your farm store on the department store premises at 521, 523 and 525 Central Avenue?

A. No, it hasn't. It would, of course, be impossible to get those items inside the store; not impos-

(Testimony of Dale Cockayne.)

sible but improbable. You could get them in if you tore them all down and set them back up again.

Q. How far is the Anderson warehouse that you have talked about, at which the farm implements are, how far is that from the department store? A. Approximately two miles.

Q. Who is in charge of your office, in charge of your farm store? A. Alvin Hunt.

Q. From what office did he operate?

A. From the building on First Avenue North.

Q. Did he have occasion to do any book work in connection with the farm sales?

A. Oh, yes, we kept perpetual inventories on all the farm parts and made weekly reports on the amount of implements [41] sold.

Q. Where did Hunt do his book work?

A. In the building on First Avenue North.

Q. The building on First Avenue North, is that covered by the written lease which is introduced in evidence as Plaintiff's Exhibit 1?

A. No, sir, it isn't.

Q. Was there anybody working in the farm store besides Al Hunt?

A. During the seasons, yes.

Q. How many men or how many employees?

A. Well, it would vary. We have had salesmen out on the road calling on farmers, and also had men up at the Roy Anderson lot assembling the machinery when it comes in. You understand it is all knocked down so it can be loaded on freight cars, and there was men up there setting that up,

(Testimony of Dale Cockayne.)

and men on the road calling on customers, and men in the building on First Avenue North selling parts.

Q. Were all of these men working directly under Al Hunt? A. Yes, sir, they were.

Q. Did any of these men use the department store as a base of operation?

A. No, sir, they did not.

Q. Who had the responsibility for the purchase of stock in the farm store?

A. Al Hunt, under my supervision.

Q. Who had the power to hire and fire employees at the farm store? A. Al Hunt. [42]

Q. Who had the direct supervision of these men who were assembling the parts and selling the parts and selling the implements? A. Al Hunt.

Q. Did you have supervision of Mr. Hunt?

A. Yes, sir.

Q. Did he have any other supervision?

A. Yes, we have specialists in the field such as implement supervisors, men who travel with only that one job; also parts supervisors, also our own district manager, Mr. McNat, from Billings, and Mr. Fikkan, from Denver.

Q. All these people shared with you supervision of the farm store?

A. Yes, sir, that is correct.

Q. Now in a normal cash sale where would the money exchange hands when the property sold, was sold by the farm store?

A. Well, let's take two items, and first take a combine, which in all cases, I believe, or most cases

(Testimony of Dale Cockayne.)

were up at the Anderson property. That, of course, would be a cash sale, with the exception of one of the 35 or 36 were all sold for cash. In most cases the man would issue you a check and you would give him a receipt.

Q. When you say the man would issue "you," whom do you mean?

A. The salesman, Al Hunt or whoever the salesman happened to be that was up there. That money would then, of course, come down to the business office on the balcony in the store. On the other hand, if it were a parts sale due to the fact [43] they were so numerous in season we kept change in the McNair building on First Avenue North and periodically during the day that would come up to the business office in the department store.

Q. After the money exchanged hands when was the merchandise delivered?

A. Well whenever the customer wanted it just as soon as after he had purchased it; in most cases the minute they buy it they want it fifteen minutes later so it wasn't much longer than that.

Q. Where was the property located?

A. To the customer's place of business.

Q. Did any of these accounts or deliveries go through the department store at 521 Central Avenue?

A. Not that I know of, Carter.

\* \* \*

Q. Mr. Cockayne, in a normal cash sale of a

(Testimony of Dale Cockayne.)

farm implement or part from the time the purchaser is first contacted [44] until the cash exchanges hands what part of the transaction takes place on the premises known as 521, 523, 525 Central Avenue?

A. None of that part of the transaction would take place in the department store.

Q. After the sale has been completed what happens?

A. Well, assuming that it was a small part—nothing. By that I mean the man is given a sales slip and goes on his way.

Q. You stated that after the sale the man is given a sales slip, by that you mean the purchaser is given a sales slip? A. Yes, sir.

Q. Who makes out that sales slip?

A. Whoever the salesman was that sold it to him.

Q. Is that made on the department store premises?

A. No, sir, it is not. Assuming now that it was a large implement; that check in all probabilities would be brought immediately to the department store.

Q. The check would be? A. Right.

Q. Let's go back. The sales slip is made out and delivered to the purchaser; what happens to the sales slip then?

A. Well, it is put on a spindle, and when the money is turned in to—

Q. Where is the spindle? [45]

A. In the building on First Avenue North.

(Testimony of Dale Cockayne.)

Q. And then what happens?

A. And then when it is turned in to the book-keeping department it is rung up in the register in the business office in the department store.

Q. Are the sales slips and the money accompanying them turned over to the business office daily?

A. Yes, sir, they are.

Q. What records are kept in the building on First Avenue North after the sale is completed?

A. All the records are kept there with the exception of the cash, or the dollars and cents. In other words, there is a perpetual inventory kept there as to what we have in stock. There is a record kept there as to what we have sold and who it has been sold to. That is, implements. We don't keep parts sales that way but we do keep implement sales that way.

Q. Are all of these records kept in the building on First Avenue North? A. Yes, sir.

Q. Are there duplications in the department store building? A. No, sir, there isn't.

Q. After the sales slip and money is delivered to the accounting office what happens to it?

A. It is handled in the usual channel. In other words, it is rung up in the cash register and merely becomes a bookkeeping procedure from then [46] on out.

Q. Does the farm store pay any part of the bookkeeping expenses?

A. It pays its rightful share, yes.

Q. Now up until now, Mr. Cockayne, we have

(Testimony of Dale Cockayne.)

been discussing these cash sales; what is the situation on contract sales and the normal procedure in in a contract sale of a farm implement?

A. Well, up until 1949, we didn't have a single time payment sale on farm implements due to the fact, of course, that they were so critical and people were so anxious to get them and money was plentiful and etc., they were all cash sales. This year in order to sell some of those large ticket items it was necessary to sell them on time payment. Most of those sales it was necessary also to demonstrate that particular item; for instance, if it were a combine, that combine would be taken to the man's place of business and there would be demonstrated, and he would tell us he wanted it on time payment. We would make out the form.

Q. Who would make out the form?

A. The salesman, whoever was calling on him.

Q. Where did he make the form?

A. At the man's place of business.

Q. And what would happen to this—is this form a conditional sales contract?

A. Yes, sir, it is. On the top part of it, it requires [47] the items and at the bottom part, the information regarding customer's credit.

Q. What happened to this contract after it was written up?

A. It would be taken to our credit office on the balcony.

Q. Did the prospective purchaser receive a copy of that contract at that time?

(Testimony of Dale Cockayne.)

A. After it was approved or disapproved, whichever the case might have been.

Q. Very well, then you state it was taken to the credit office? A. That is right.

Q. Where is that located?

A. That is on the bayeony of the department store. Now, in one or two occasions, the customer has been brought into the department store and there his application taken for credit.

Q. And in the event the man's credit is found unsatisfactory is there a sale made?

A. No, sir, there isn't.

Q. In the event the prospective purchaser's credit is satisfactory, what happens?

A. He makes his down payment and the merchandise is delivered to him and a copy of the contract is also delivered to him, or in the case where the item has been demonstrated at his place naturally there is no delivery problem, so a [48] copy of the contract is sent to him or taken out to him, because at that time the machine would need further adjustment.

Q. What percentage of your farm sales have been contract sales? A. 2.21.

Q. 2.21 per cent? A. Yes, sir.

Q. How many contract sales have you had altogether in the farm store? A. Nine [49]

\* \* \*

Q. (By Mr. Williams): Mr. Cockayne, you have now in your possession, have you not, the two volumes which purport to be the sales records of

(Testimony of Dale Cockayne.)

Gamble-Skogmo, Inc., store here in Great Falls, Montana?

A. Yes, sir, up to and including September 30th, I believe. Yes.

Q. What is the beginning date of these records?

A. March of 1946. It is in 1943, but the top of it is torn off, Carter, I can't answer that.

Q. At any rate the records go back to sometime in 1943? A. Yes, sir.

Q. Do those records show your gross sales for the Gamble-Skogmo store here in Great Falls?

A. Yes, sir, they do.

Q. Do they show all wholesale sales during that period of time? [50]

A. They show every sale that has been made and every expense that has been made from the inception sometime in 1943 up until and including September of this year.

Q. Were these records prepared in the normal course of business of Gamble-Skogmo, Inc.?

A. Yes, sir, they were.

Q. Prior to the time that they were subpoenaed in the District Court of Montana, in Great Falls, were they in your possession?

A. Yes, sir, they were.

Q. And since you have been manager of the Gamble store here in Great Falls, Montana, were those records prepared under your supervision?

A. Yes, sir, they were.

Q. To the best of your knowledge were those records true and correct?

(Testimony of Dale Cockayne.)

A. Yes, sir, they were.

Q. From those records will you tell the court what the total net retail sales of farm implements and parts were from the time the farm store was first started in Great Falls, Montana, to October 19th, 1949.

A. \$259,320.40. Now, incidentally, that figure is right up to December 23rd.

Q. The figure which you have just given me then is from the time that farm sales were first started at Great Falls, Montana, until December 23rd, 1949?

A. Until it was closed out, yes, sir.

Q. And does that include all farm sales?

A. Yes, sir. [51]

Q. Then I am to understand from you that the total amount of farm sales is the figure of \$259,-320.40?

A. Yes, sir, that is correct to the best of my knowledge.

Q. I believe you testified that Gamble-Skogmo, Inc., is no longer in the farm store business in Great Falls, Montana? A. Yes, sir, that is correct.

Q. Then if the defendant McNair Realty Company is entitled to 2% on farm sales, it would be entitled to 2% on the figure of \$259,320.40, is that correct? A. Yes, sir, that is correct.

Q. What is 2% of that figure?

A. I don't have it here.

Q. Do you have it elsewhere that you have figured it up? A. No. \$5,186.40 and 80 mills.

(Testimony of Dale Cockayne.)

Q. What figure do you have?

A. \$5,186.40

Q. Do the records which you have in front of you show the total amount of rent which has been paid by the farm store apart from any rent claimed by McNair Realty Company by virtue of the written lease dated December 27th, 1943?

A. Yes, sir, they do. That amount is \$6,973.26, which gave us a rental percentage of 2.68.

Q. When you say that gives you a rental percentage of 2.68, what do you mean?

A. The percentage of rent paid on the total sales we have had since the inception of the farm unit up until the [52] time it was closed out.

Q. Does that account for any rent claimed by McNair Realty Company by virtue of their lease dated December 27, 1943? A. No, it does not.

Q. If Gamble-Skogmo, Inc., had paid 2% as claimed under that lease, what would your total rental percentage be? A. 4.68. [53]

\* \* \*

Mr. Williams: Read the question.

(Question read.)

Q. Does the plaintiff Gamble-Skogmo, Inc., have a company policy on the bookkeeping setup and the payment of expenses of the individual units?

A. Yes, sir, they do. The purpose of keeping the various units separate is to decide whether or not it is or is not profitable, so for that reason it

(Testimony of Dale Cockayne.)

is watched very carefully [54] that the expenses of one store is not charged with the expenses of another or the sales of one is not rung up in the sales of another.

Q. Does that policy permit a farm store to pay part of the rental of a department store?

A. No, sir, it does not.

Q. Does that policy require a farm store to pay its share of the bookkeeping and other expenses even though they are incurred in a, that is, in the premises leased by a department store?

A. Yes, sir, it does.

Q. In the bookkeeping setup here in Great Falls, Montana, has the farm store been charged with any per cent of the rent on the premises located at 521, 523, 525 Central Avenue?

A. No, sir, they have not. [55]

\* \* \*

Q. Mr. Cockayne, for the purposes of determining the rental due under the lease dated December 27th, 1943, between Gamble-Skogmo, Inc., and McNair Realty Company, how are the net retail sales determined?

A. Well, of course, first you would take the gross sales figures of any sale that was made in the store regardless of what it was, and it would be less contracting sales, less return sales, less repossession, less employees' discount, in order to arrive at the net retail sales figure.

Q. Would you also deduct from the gross sales, wholesales? A. Yes, sir.

(Testimony of Dale Cockayne.)

Q. Now what are the wholesales which the Great Falls department store makes?

A. I didn't hear you.

Q. In the Great Falls department store what are your wholesales?

A. What are wholesale sales?

Q. Yes.

A. Wholesale sales as we term them here are made to surrounding dealer stores, such as Fort Benton, Chinook, Stanford, Big Sandy, etc.

Q. Are these sales made at a profit? [56]

A. [No answer in copy.]

Q. Does your store make any wholesale sales to anybody other than other Gamble dealer stores?

A. No, sir, we do not.

Q. Since its inception has the department store here made any wholesale sales to anyone other than Gamble dealer stores?

A. No, sir, they have not.

Q. And has there ever been one sale to anybody?

A. No, sir.

Q. I believe you stated that you also deducted from the gross sales the sales to employees, is that correct? A. Yes, sir.

Q. What sales did you make to employees?

A. Sales like we would make to anybody else. In other words, any item they wish to buy in the store regardless of what that item might be they are allowed a discount on that item unless it is a special sales item where it is being sold for cost or below and then they are not entitled to a discount from it.

Q. I believe you also stated that from the gross

(Testimony of Dale Cockayne.)

sales you also deducted repossession before determining the net retail sales. What are repossession?

A. Repossessions are sales that have been sold on time payment contract and it is necessary for them to be repossessed because of nonpayment. [57]

Q. What were the net retail sales for the first lease year from March 1st, 1944, to February 28th, 1945, as disclosed by your sales reports?

A. \$259,463.65.

Q. What was the rent paid for that lease year?

A. \$5400.00.

Q. In other words, since the net retail sales did not meet at the minimum of \$270,000.00 the Gambles store paid the minimum retail of \$5400.00, is that correct? A. Yes, sir, that is true.

Q. What were the net retail sales for the second lease year from March 1st, 1945, through February 28th, 1946? A. \$254,359.05.

Q. Is that the figure disclosed by the sales report made by the Gamble store in Great Falls?

A. Yes, it is.

Q. What was the rent paid for the second lease year? A. \$5400.00.

Q. What do your records disclose as the net retail sales for the third lease year from March 1st, 1946, through February 28th, 1947?

A. \$567,737.86.

Q. What was the rent paid for the third lease year? A. \$11,354.76. [58]

Q. And examining these figures it appears that there was a considerable increase in volume in net

(Testimony of Dale Cockayne.)

retail sales during the third lease year; what was the reason for that increase in volume?

A. That is when we had our expansion in Great Falls and we opened up the basement of the department store, and in time the luncheonette was installed.

Q. Who was in charge of that opening?

A. I was.

Q. When you were in charge of it out of which office did you work?

A. From the Minneapolis office.

Q. Is that the headquarters office?

A. Yes, it is.

Q. During this third lease year did Gamble expend any money in improvements and fixtures of the Gamble Department Store?

A. Yes, a considerable amount of money, approximately—

Q. What was the volume of net retail sales according to your sales records for the fourth lease year from March 1st, 1947, through February 28, 1948? A. \$588,309.90.

Q. What do your records disclose as the rent which was paid on the fourth lease year?

A. \$11,766.20.

Q. What do your records disclose as the total of net retail sales during the fifth lease year from March 1st, [59] 1948, through February 28th, 1949?

A. \$703,402.77.

Q. What was the rent paid on the fifth lease year? A. \$14,068.00.

(Testimony of Dale Cockayne.)

Q. I understand that the sixth lease year has not yet been completed. What are the total net retail sales disclosed by your records from March 1st, 1949, to through November 30th, 1949?

A. \$469,442.33.

Q. And what rent has been paid for that period through November 30th, 1949?

A. \$9,111.70.

Q. Does that include a \$450.00 monthly payment check paid for the month of November?

A. Yes, it does.

Q. Do you know whether or not that check was accepted by McNair Realty Company?

A. It was not.

Q. What is the total rent that has been paid to McNair Realty Company by virtue of the written lease dated December 27th from March 1st, 1944, through November 30th, 1949? A. \$57,100.66.

Q. What is the net profit or loss which the Gamble Store has made during that period? [60]

\* \* \*

A. \$19,781.33 loss.

Q. Has the Gamble Department Store been operating at a profit or loss since October 1st, 1949?

A. At a profit.

Q. What is the amount of the profit from October 1st, 1949, through November 30th, 1949?

\* \* \*

A. \$5,260.32 profit.

Q. Was the situation on October 1st, 1949, ap-

(Testimony of Dale Cockayne.)

proximately the same as it was on October 3rd, 1949, as far as the profit or loss was concerned?

A. Yes, sir, it was.

Q. Is the Gamble Store now operating at a profit? A. Yes, sir, it is.

Q. I believe you stated a few minutes ago that during the third lease year a considerable amount of money was expended by Gamble-Skogmo, Inc., in putting in improvements and fixtures on the premises leased by the written lease dated December 27th, 1943, is that correct?

A. Yes, sir, that is true.

Q. What was the condition of the department store premises which are those involved in that written lease prior to [61] those improvements?

A. I think Mr. Hill could better answer that, Mr. Williams. I was through here several times but I don't remember exactly the condition of it. I might add in the store opening work our work started after the construction work was finished. We put in the fixtures but we didn't remodel the buildings.

Q. Do your records show what figure was expended for improvements of the premises by the plaintiff Gamble-Skogmo, Inc.?

A. Yes, they do.

Q. What figure was expended during the third lease year? A. \$29,342.46.

Q. In your bookkeeping system under what account is that shown?

A. Prepaid leasehold.

(Testimony of Dale Cockayne.)

Q. What goes into that account?

A. Store improvement.

Q. Any other expenditures? A. No, sir.

Q. How in your bookkeeping is that expenditure charged off?

A. Well it is amortized off over the life of the lease.

Q. Since these were put in in the third lease year I assume it would be amortized off during the balance of the lease yet to run, is that correct?

A. Yes, sir.

Q. As of November 30, 1949, what was the balance still in the prepaid leasehold account?

A. \$14,923.89. [62]

Q. Under normal operation would that figure be amortized over the balance of this lease?

A. Yes, sir, it would.

Q. What would be the effect on that investment of \$14,923.89 if the lease were suddenly terminated?

A. Well it would be an entire loss.

Q. Would any of it be recovered?

A. No, sir. Well, there would be—no, there wouldn't either.

Q. The improvements that are in the prepaid leasehold account, do they go with the building?

A. Yes.

Q. If the lease were suddenly terminated and the landlord took possession, would he obtain the advantages of these improvements?

Mr. Hall: Would he what?

(Testimony of Dale Cockayne.)

Q. Would he obtain the advantages of these improvements? A. Yes, he would.

Q. I believe you stated a few moments ago that in the third lease year a considerable amount of money was expended by Gamble-Skogmo, Inc., for fixtures, is that correct?

A. Yes, that is true.

Q. Do your records show the total amount expended for fixtures at that time?

A. Yes, they do, \$87,107.99.

Q. What fixtures were put into the department store at [63] that time?

A. Well, all of the fixtures that were in the basement. We utilized those, of course, that we were using before, on the main floor, all of the wall shelving and tables and additional cash registers. Any type fixture in the store that figure would cover it.

Q. Did that include the counters?

A. Yes, all of the counters and wall shelving.

\* \* \*

Q. In your bookkeeping practice did you amortize the amount expended for fixtures over the period of the lease? A. Yes, that is true.

Q. As of November 30th, 1949, what do your records show as the amount which has not yet been amortized in the fixture account?

A. \$55,187.40.

Q. In the event the lease were suddenly terminated what would happen to that expenditure?

A. Well that is rather a hard question to an-

(Testimony of Dale Cockayne.)

swer. If we could find another store of the exact dimensions, having the same partitions, the same stairways, the same everything else, they undoubtedly would be moved into that store. If [64] we weren't able to, then they would probably be sent back to the fixture factory and there refinished and sent out as we needed them in other stores.

\* \* \*

Q. In the event you were forced to ship these back to where you make your fixtures, what system would you use to ship them?

A. Well, they are of course screwed together, and as, you understand, they would be unscrewed and boxed up and sent back just as they were when they were sent out here.

Q. Would there be any expense involved in dismantling those fixtures and shipping them back to the factory where Gamble-Skogmo, Inc., manufacturers the fixtures?

A. Oh, yes, it would be the labor of taking all of them apart and expense of crating and shipping back there, and there would be a good possibility some of them would have to be refinished after they got there.

Q. What is the situation on the lunch counter?

A. The same would be true there.

Q. Do you know how much it would cost to take these [65] fixtures down and set them up in another store or can you give a reasonable estimate?

A. It would run somewhere between ten and fifteen thousand.

(Testimony of Dale Cockayne.)

Q. What was the nature or what was the amount of inventory as disclosed by your records in the Gamble store on November 30th, 1949?

A. \$178,180.14.

Q. Does that figure represent the cost price of your inventory?

A. Yes, sir, it does, laid down in Great Falls.

Q. If the lease were suddenly terminated, what would happen to that inventory?

A. Well, of course, it would depend entirely upon the length of time, a lot of it could and would be put back into the warehouse and to other stores, and a lot of it would have to be disposed of right here inasmuch as all stores order their own merchandise and it is pretty hard to arbitrarily ship them anything.

Q. I suppose that your inventory is—what is the status of your inventory at the present time as compared with November 30, 1949?

A. Oh, it is lower than that by probably \$60,000.00 lower than that, \$50,000.00 lower.

Q. In the event of a sudden termination of this lease [66] you stated that part of the goods would be shipped back and you say part would be sold here? A. That is true.

Q. Would they be sold at their regular price?

A. No, you would have to—I think it would be fair to say if you got sixty cents on the dollar taking it on the whole, you would have done a good job. It would depend on the length of time you had to do it, of course.

(Testimony of Dale Cockayne.)

Q. Have you ever conducted any of these sales where you had to sell merchandise in a hurry?

A. Yes.

Q. And has your experience been that you would be lucky to obtain sixty cents on the dollar on such sales? A. That is right.

Q. What would you estimate would be the loss to Gamble-Skogmo, Inc., on the present inventory in the event the lease were suddenly terminated?

A. It would be approximately \$50,000.00. [67]

\* \* \*

Q. Do you know of any other situation which would happen in the event of the termination of this lease at the present time?

A. Your accounts receivable, there would have to be something set up to handle that until it was closed out, also the amount of people we have employed, and the goodwill we have built up over the period of years we have been here; how you would measure that in dollars and cents, I don't know.

Q. You stated people would be unemployed, what people are those?

A. The folks employed there by us now unless they could find other employment.

Q. Do you have any trained personnel?

A. Oh, yes, we have.

Q. What would happen to them?

A. I really can't answer that any more than, of course, the amount of money we have spent in training them would certainly be down the drain. It

(Testimony of Dale Cockayne.)

costs considerably, if I can use that term. In the retail business it costs you one thousand dollars on every employee you have to develop that employee to your way of doing business regardless whether, regardless [68] of the experience he or she might have had prior to the time she goes to work for us.

Q. Do you have another location in Great Falls in which Gamble-Skogmo, Inc., could operate?

A. Not to my knowledge.

Q. How long would it take you to set up another Gamble-Skogmo Store in the event you could find such a location?

A. Oh, 60 to 90 days. [69]

\* \* \*

Q. On the date of October 3rd, 1949, what was the [70] situation as to the state of repair of the exterior portions of the premises leased from the McNair Realty Company at 521 Central Avenue?

A. Everything was in good shape excepting the roof.

Q. What was the matter with the roof?

A. It had about three or four holes in it.

Q. Did it leak? A. Yes, sir.

Q. How long had that condition existed?

A. Ever since I have been here in September of 1947.

Q. Had the defendant McNair Realty Company been advised of that situation?

A. I think it had been.

Mr. Hall: May it please the court, I can't find in the pleadings any issues in connection with these

(Testimony of Dale Cockayne.)

matters concerning which counsel is inquiring so that I know nothing about any claim heretofore made to any leaks in the roof or anything of that character.

The Court: Whether he knew, whether the defendant had been notified of the leaking of the roof? You didn't say positively?

A. I said I think that they have.

The Court: Oh, you think they have.

Mr. Williams: If the court please, the reason for this line of questioning is that the defendant has asked for forfeiture of this lease, and if they are going to come into [71] equity and ask for forfeiture of a lease to which they are a party, they must be able to show that they have performed fully so they can come into a court of equity with clean hands. If on October 3rd they asked to have this lease terminated they are in default on some of the provisions of the lease itself, then they are not justified equitably in declaring a forfeiture.

Mr. Hall: Now, upon the basis of counsel's statement, there is absolutely nothing in the complaint concerning that matter, is there?

Mr. Williams: No.

Mr. Hall: Not a thing and do you or are you suggesting to the court now we are in a court of equity?

Mr. Williams: Yes.

Mr. Hall: Well, I don't think we are, if the court please. My study of the cases especially in federal courts is that this is a special statutory action,

(Testimony of Dale Cockayne.)

neither in law nor in equity. It differs somewhat from ordinary equity actions in that, for instance, on a question of fact if your Honor desired, you could call a jury here or the litigants could require the assistance of a jury, and the whole thing is, it seems to me, we are going far afield for any trial. It's claimed for the first time in my knowledge in any litigation at least that there has been a default in the lease so far as the lessor is concerned, and as counsel admits there [72] is nothing in the pleadings at all.

The Court: I suppose the usual terms are incorporated in the lease in which the lessor did promise to keep the premises in a state of repair or that they were at the time of leasing in a state of repair and would continue to keep the property in a state of repair. Those are the usual terms incorporated. I haven't read the lease to see if they are in this one.

Mr. Hall: I think that is in paragraph five as to the obligations of the lessor with reference to making repairs and keeping the premises in good condition.

The Court: Well, I don't know what bearing it may ultimately have on the outcome of this case, but I will let it go in subject to your objection, although he hasn't stated positively about it whether the defendant had any notice or not. He thinks they may have. That is not a very strong showing. Well, go ahead, let's get on.

Mr. Williams: I believe that is all, Mr. Cockayne.

DALE COCKAYNE

Cross-Examination

By Mr. Hall:

Q. Mr. Cockayne, the lease would have expired on its own terms in the year 1954, would it not?

A. Yes, I think that is true. [73]

Q. And at that time unless the lease was renewed and a new lease entered into the Gamble store would have been compelled to remove from the premises in question? A. Yes, that is true.

Q. And to have left there all of the remodeling that Gambles have done in the store?

A. That is correct.

Q. And whether or not that would be to the advantage of the landlord would be a question?

A. Yes.

Q. In other words, there were two stores there, were there not, originally?

A. Yes, sir, there were.

Q. And a part of the remodeling was in connection with the putting of the two stores into one store? A. That is true.

Q. There was also some remodeling done with reference to the entry to what now is called the basement or downstairs store?

A. Yes, sir, that is true.

Q. So that if the landlord desired to put the premises back into two or three stores, it would be to his disadvantage and not his advantage?

A. That is true.

Q. And the same situation is true with reference

(Testimony of Dale Cockayne.)

to the fixtures at the expiration of the lease you have to move them out? A. That is true.

Q. And you would have to take them down? [74]

A. That is correct.

Q. And you would have to ship them?

A. That is correct.

Q. Unless you were able to use them in town?

A. That is correct.

Q. So the termination of the lease four years from now would have the same effect so far as remodeling is concerned as a termination this year?

A. Yes, sir, that is true.

Q. Now you suggested to Mr. Williams perhaps if you had ninety days' notice that would work to the advantage of Gamble Stores, that is to say, you would be able to dispose of merchandise possibly at a profit?

A. It would be possible if you had ninety days to possibly dispose of the goods at a profit, yes, sir.

Q. And I would suppose then that you would order no new merchandise after receiving the notice?

A. Yes, you would if you were going to make it profitable.

Q. You would keep on ordering merchandise?

A. Yes, sir.

Q. Now when was it that you received the notice in question that we have been talking about in this case? You told Mr. Williams, I believe, about the termination notice?

A. I believe it was October 3rd.

(Testimony of Dale Cockayne.)

Q. . October 3rd, and that is almost ninety days ago, is [75] it not? A. That is true.

Q. And you are still in possession of the premises? A. Yes, sir.

Q. So that you have had approximately ninety days' time up to date? A. Yes, that is true.

Q. And, as I understand you, you intend to stay in the store until some decision of the court is rendered that the lease is terminated?

A. Yes, that is true.

Q. Have you ordered additional merchandise since the notice of termination was given to you?

A. Yes, sir.

Q. And have sold considerable merchandise?

A. Yes, sir.

Q. Now, when did you first become familiar with the lease on the Great Falls store?

A. That would be a little difficult to answer. I would say sometime in 1945.

Q. That is while you were acting as a supervisor for Gamble-Skogmo, Inc., and working out of the Minneapolis office?

A. Yes, sir, that is true.

Q. And do you know a man by the name of Mike F. Hoben? A. Yes, sir.

Q. Who is he?

A. He used to be in charge of the real estate department in Minneapolis.

Q. And was also in charge, was he not, at the time this [76] lease was entered into in December; 1943? A. Yes.

(Testimony of Dale Cockayne.)

Q. Who took his place? A. Mr. Hill.

Q. That is William T. Hill who sits here at the table? A. Yes.

Q. And he is the gentleman who works out of the Minneapolis office? A. Yes.

Q. Mr. Hoben was in general charge, was he not, of all real estate transactions for Gamble-Skogmo, Inc.? A. Yes, sir.

Q. And Mr. Hill has taken his place now?

A. Yes, sir.

Q. How long has Mr. Hill been in Mr. Hoben's place?

A. This would be an estimate, but I would say approximately a year.

Q. Mr. Hoben had an unfortunate circumstance where he had his legs removed and has been ill since? A. Yes, that is true.

Q. Are you generally familiar with the Gamble leases? What I am getting at, Mr. Cockayne, is the leases are on a form provided by Gamble-Skogmo, are they not? A. That is true.

Q. A portion being in print and a portion in the spaces typed in? A. Yes, sir, that is true.

Q. And on the back page of Plaintiff's Exhibit 1 you will find Mr. Hoben's name, do you not? [77]

A. Yes.

Q. M. F. Hoben? A. Yes.

Q. And the initials? M.F.H.? A. Yes.

Q. Prepared by M.F.H., submitted for approval by M.F.H.? A. Yes, that is correct.

(Testimony of Dale Cockayne.)

Q. So you would gather from this Mr. Hoben prepared the lease? A. Yes, I would.

Q. In his capacity as the man in charge of the real estate transactions for Gamble-Skogmo, Inc.?

A. Yes, sir.

Q. You became manager here in what year, Mr. Cockayne? A. 1947, September.

Q. September, 1947? A. Yes, sir.

Q. Prior to that time, however, you had been more or less familiar with the operations here in Great Falls? A. Yes, sir.

Q. Through several trips you made as supervisor and in other capacities? A. Yes, sir.

Q. And when was it that Gamble-Skogmo first entered into the farm machinery business?

A. In 1947.

Q. Would that be in January, 1947, prior to your coming to Great Falls? A. Yes, sir.

Q. And had they contemplated entering into that business prior to January 1st, 1947?

A. I can't answer that.

Q. You don't know then whether they had made any arrangements [78] with reference to the sale of farm machinery here in Great Falls or in the Great Falls territory prior to January, 1947?

A. No, sir, I don't know.

Q. Your first contact with the matter was when you came here as manager in September, 1947, when the farm machinery operations were a going concern? A. Yes, sir.

Q. Now, Gamble-Skogmo operate their stores on

(Testimony of Dale Cockayne.)

the basis of several departments, do they not, Mr. Cockayne? A. Yes, sir.

Q. And those departments are called units, are they not, for bookkeeping purposes?

A. That is true.

Q. And as I think you told Mr. Williams on your direct examination the regular department store business is designated unit No. 1? A. Yes.

Q. Or department No. 1?

A. Yes, sir, that is true.

Q. And the lunch counter is called Unit No. 2?

A. Yes, sir.

Q. And what is unit No. 3?

A. I am really not familiar with 3 and 4. I believe, however, it is a drugstore and—well, I can't even give you an idea.

Q. I think that is what you told me on your deposition, either 3 or 4 constituted a drugstore department. You do not have a drugstore department in your operation?

A. No, sir, we don't. [79]

Q. And unit No. 5 is the farm, what they call farm department or farm unit, is it not?

A. That is right.

Q. Do you know of your own knowledge when the farm unit or farm department was first set up by Gamble-Skogmo, in what year?

A. In the company as a whole?

Q. In the company as whole, yes.

A. I would say sometime in 1945 or 1946. I can't give you a definite date as to that.

(Testimony of Dale Cockayne.)

Q. And that was set up then like any other department or unit of the store operations?

A. Yes, that is true.

Q. Now were you familiar with the time that Gamble-Skogmo arranged to rent the property facing on First Avenue North here in Great Falls immediately to the rear of the department store at 521, 523, 525 Central?

A. I am not familiar with that, no, sir.

Q. That was being rented by Gamble-Skogmo at the time you came here? A. Yes.

Q. What is all on that property, Mr. Cockayne?

A. Right today?

Q. Yes.

A. Right today there is furniture, floor covering, and rebuilt motors in there now.

Q. Oh, I see what you mean. What I was getting at first, Mr. Cockayne, was the character of the buildings or [80] improvements upon that property?

A. Well, it is just a lot and tile building with a so-called balcony all the way around it on the inside of the building.

\* \* \*

Q. Well, in any event, the only improvement upon the lot immediately north across the alley from the premises in question here is this warehouse?

A. That is true, yes, sir.

Q. That is, it has no display windows or anything of that character? A. No.

Q. And the remainder of the property is a vacant lot? A. That is true.

(Testimony of Dale Cockayne.)

Q. It would be more specific to say the building was on First Alley North in lieu of First Avenue North? A. That is true. [81]

Q. You say you now have in that warehouse furniture and things of that character?

A. That is true.

Q. That is, you are using it as a warehouse?

A. Yes.

Q. And how long has that situation been true?

A. Well, off and on ever since I have been here.

Q. That is throughout the period that Gambles have had the warehouse under lease there has been furniture and other things stored in there?

A. Yes, sir, that is correct.

Q. For warehouse purposes? A. Yes.

Q. And that was in connection with your operation of the department store? A. Yes.

Q. You carried furniture as a part of the operations of the store or department No. 1?

A. Yes, sir.

Q. And would that be true all of the time you have been manager of the operation? A. Yes.

Q. Anything else in there other than furniture during the time you have been manager?

A. All of the farm parts.

Q. All of the what?

A. All of the farm parts.

Q. And those would be repair parts and replacement parts for the larger farm machinery?

A. That is correct, for the implements which we sell.

(Testimony of Dale Cockayne.)

Q. I am not entirely clear, Mr. Cockayne, as to what [82] you mean by implements. I have been used to calling the larger things such as combines and tractors and mowers and wagons as farm machinery, and implements as shovels and things of that character.

A. We reverse it and in order to make it easier for us we call them implements.

Q. Everything is implements, is that right?

A. The parts carried were parts to service the implements we sell.

Q. And by implements you mean tractors, combines?

A. Tractors, combines, mowing machines, manure spreaders.

Q. And by repair parts you mean parts to replace parts of those machines that have been worn out?

A. Yes.

Q. Or injured in some fashion? A. Yes.

Q. Now is there anything else in this warehouse other than furniture and the parts?

A. No, sir.

Q. Now where were the machines themselves kept, the farm implements?

A. In the lot directly behind that building, and in the building and lot that we rented from Roy Anderson Company at 23rd Street and 9th Avenue North.

Q. Can you tell me how that property was rented from Roy Anderson? A. No, sir, I can't.

(Testimony of Dale Cockayne.)

Q. Was that being rented at the time you came out here? A. Yes. [83]

Q. So that would be some time prior to September, 1947? A. That is true.

Q. There was no building for the display of the farm machines? By machines I mean tractors, combines and things of that sort. There was no building, was there?

A. Well, there was no building with glass windows in front of it if that is what you mean? We used the building at Roy Anderson's for displays and sales and also the lot directly in front of the building.

Q. Was there a telephone in the warehouse?

A. Yes, sir, there was.

Q. Across the alley from the department store?

A. No. There was a telephone at the Roy Anderson warehouse.

Q. What was the telephone number?

A. Roy, do you know? I can't tell you.

Q. Don't answer it if you don't know.

A. I don't know.

Q. I was wondering if that telephone was an extension of the telephone in the department store?

A. No, sir, it was not.

Q. Do you know when the telephone was put in the building up at Roy Anderson's?

A. It was after I came out here. It wasn't here when I came. [84]

Q. By the way, what is the number in the store?

A. 4384.

(Testimony of Dale Cockayne.)

Q. I understand you had no telephone or no extension in the small warehouse across the alley?

A. That is true.

Q. Now, in a general way, was there anything stored in this warehouse along the line of tractor tires and things of that character?

A. Occasionally.

Q. Where were the items such as tractor tires displayed and sold?

A. In the department store in the tire department.

Q. In the department store? A. Yes.

Q. They were not carried as a part of your farm store then? A. No, sir.

Q. Were the replacement tires carried as a part of the farm store operation? A. No, sir.

Q. No tires at all?

A. No, sir. Excuse me, let me rectify that. Now, trailers, there's some items come with tires on them, rubber tires.

Q. That would be true of tractors, would it not?

A. Yes, that is right.

Q. And trailers and things of that sort and wagons?

A. Yes. And I believe at one time we did have some implement tires there.

Q. When you say "there," you mean in the small warehouse [85] across the alley? A. Yes.

Q. And those were carried then, the tires and things were carried as a part of your farm store operation?

(Testimony of Dale Cockayne.)

A. Those that I just now mentioned, yes.

Q. Now, of course, you did a good deal of advertising, did you not, so far as your store was concerned and so far as each one of the units of your store were concerned? A. Yes, sir.

Q. And where did you direct the public to go in the advertising?

A. In most cases the department store.

Q. You gave the number, did you not, 521, 523, 525 Central Avenue? A. Yes.

Q. And in many of the advertisements there is a reference to Mr. Al Hunt, or "see Al Hunt"? I believe you mentioned Mr. Hunt's name this morning in the testimony? A. Yes, sir.

Q. As I understand it he was the manager under you of the farm department?

A. That is true.

Q. You, however, as manager of the store operations in Great Falls, had supervision of all three departments, did you not?

A. Yes, sir, that is true.

Q. You were the boss? A. Yes, sir.

Q. And I believe in your deposition you told me that you received a commission upon sales made by all three [86] departments?

A. Yes, sir, that is true.

Q. And that is true up to the present time, is it not? A. Yes, sir.

Q. Now you told me that the advertisements which were put in the papers by Gambles directed customers to go to the department store?

(Testimony of Dale Cockayne.)

A. Yes, sir.

Q. And when a customer came into the department store did he find Mr. Hunt there?

A. No, sir, he did not.

Q. And was he directed to go anywhere by someone in the store?

A. He was directed to go to the building on the alley as you stated on First Avenue North.

Q. So he first came in the department store and was directed to go across the alley?

A. That is true.

Q. And there he found Mr. Hunt?

A. That is correct.

Q. Now did the farm store carry any cash, petty cash over there in the warehouse?

A. During the parts of the season, during the busy season.

Q. During the part of a year? A. Yes.

Q. And the busy season would be three or four months out of the year? A. Yes.

Q. And did that petty cash account amount to anything in money? A. \$20.00.

Q. And where did that money come from? [87]

A. From the store.

Q. And who gave it to him?

A. Either myself or the office manager.

Q. And what was done at night with that petty cash fund?

A. It was checked back in to the store.

Q. And I believe you said something when a large check came in to the farm department it was

(Testimony of Dale Cockayne.)

immediately brought over to the business office?

A. In most cases it was, yes.

Q. That would be a check in payment for a tractor or some large machine? A. That is true.

Q. But the cash probably was not brought into the office until just about the time the store closed, is that right? A. That is true.

Q. Now, where was the business office for all three of the departments?

A. On the balcony of the department store.

Q. And how many employees did you have there in the business office?

A. Oh, anywhere from four to six or seven.

Q. I can't hear.

A. It would be say approximately five.

Q. It would average five?

A. That is true.

Q. And the business operations of the entire store, that is, all three departments, was handled there from that business office?

A. Yes, the money was accounted for there. [88]

Q. Not only that the orders were made from there for goods, were they not?

A. Yes and no.

Q. Well, that doesn't mean very much to anyone. You understand what I mean?

A. Yes, and it is true and it isn't true.

Q. Let me get at it this way. You do, as manager, order goods, I assume, practically every day of the year? A. Yes, sir.

Q. And from where do you order those goods?

(Testimony of Dale Cockayne.)

A. From the department that we might be ordering. In other words, we have a stock record system and when we order merchandise we order it because merchandise has been sold.

Q. I see. From where do you order it?

A. And I say from the department from which we are ordering.

Q. Of course, I am confused.

A. Let me explain it this way. If we were going to order shoes, you would first take your stock record book and count the shoes on hand and then lay this book down, and usually—well, you would write the orders buying back the shoes that you have sold.

Q. And from where would you get those shoes?

A. From Minneapolis.

Q. Well, that is what I am trying to get at. You would order it from the headquarters of the Gamble-Skogmo some place? [89] A. That is true.

Q. They maintain a warehouse here in the State, do they not? A. That is true.

Q. And your order would perhaps be filled out of one of those warehouses? A. That is true.

Q. But your order would go direct from on the floor? A. Well, not all cases.

Q. And who would make that order?

A. The department head involved.

Q. And each one of the departments has a department head, is that right? A. Yes.

Q. Just the same as Mr. Hunt is the head of the department store and someone else is the head of the various departments in the department store?

(Testimony of Dale Cockayne.)

A. It isn't quite that way. There is a man in charge of the main floor and all of the clothing, and another man in charge of the basement.

Q. Now do those orders have to be approved by you? A. No, sir.

Q. Do they go to the business office?

A. Yes, for mailing.

Q. And do you do any checking up there in the business office? A. Quite often I will, yes.

Q. Now, are any goods handled by catalog so far as Gamble is concerned. [90]

A. You mean where the customer would come in or send in an order?

Q. The customer would come in and look at a catalog?

A. It would be very very little, if any.

Q. But you do, I assume, and particularly in connection with farm machinery, have a large number of brochures and things of that sort describing machines like automobiles are described?

A. Yes.

Q. Telling what they do and how they are made and what for? A. Yes, sir.

Q. And where are those kept?

A. All over the store.

Q. All over the department store?

A. Right, and required—

Q. And if a man came into the department store with reference to some particular farm machine or

(Testimony of Dale Cockayne.)

replacement, he could obtain one of those brochures or advertisements there in the department store?

A. It wouldn't have been improbable but in most cases he would have been referred to Mr. Hunt across the alley.

Q. But nevertheless they are kept for customers in the department store? A. There's books.

Q. Now from what place where the employees paid, from the business office?

A. The checks were made there.

Q. Were made and delivered from there to various [91] employees? A. Right.

Q. And that practice was true with reference to all the employees of all of the departments?

A. Yes, sir, true.

Q. During the period of time that you have been manager? A. Yes, sir.

Q. Now, do I understand in the business office all of the records of the Gamble operation here in Great Falls are kept and maintained?

A. All of the sales records.

Q. Well, what other records are there?

A. Stock records.

Q. By stock records you mean the inventory that is kept up? A. Yes, sir, that is true.

Q. What other records besides the stock records and sales records are there?

A. Demonstration records.

Q. What do you mean by that?

A. Merchandise out on demonstration, radios, refrigerators, etc.

(Testimony of Dale Cockayne.)

Q. That is some sort of receipt showing—

A. Showing where the merchandise is, and also records of that in stock.

Q. Where are these demonstration records kept?

A. In the department involved. [92]

Q. And is any copy sent up to the business office?

A. No, sir, there isn't.

Q. Nothing comes to the business office like an actual sale has been made of the particular item involved? A. That is true.

Q. And then as soon as that sale is made whether on credit or by cash the record of that transaction comes to the business office?

A. Yes, that is true.

Q. And when does it come to the business office?

A. The following morning when the cash registers are checked.

Q. And that would be in the form where the transaction is a credit or—

A. That would be a cash sale.

Q. That would be simply a sale slip?

A. Well, it would be a record on the cash register tape of the sale.

Q. Well, do you also in the business office check the tape against the individual sales slips?

A. Yes, sir.

Q. And the sales slips and the tape comes into the business office? A. There is no sales slips.

Q. You don't have sales slips?

A. No, sir, automatic with the cash register.

Q. Now in the event of a credit sale? [93]

(Testimony of Dale Cockayne.)

A. That is rung up in the office.

Q. It is what?

A. It is rung up in the office, in the office cash register. An okay is given to the party involved and they go back down and pickup their merchandise.

Q. So that in the event a person comes in there and wants to charge or buy on contract, that must be approved by the business office?

A. Yes, sir.

Q. And if it is a contract, as I understand you, the contract may be prepared out on the scene, that is, out where the purchaser lives in the event of the farmer who desires a demonstration but it must be approved by the business office?

A. In all cases, yes.

Q. Now, after the business office has received the sales records for a particular day, and I am including all three departments, then what is done by the business office with reference to those sales?

A. They are recorded on a report and one copy is kept in the office and one copy is forwarded on to Denver.

Q. To Denver? A. Yes, sir.

Q. And are the sheets that you identified as being the records of Gamble-Skogmo covering the sales and operations over a period of years, are they made up in Denver? A. Yes, sir, they are.

Q. And a copy is sent to you, is that right? [94]

A. Yes, sir.

Q. And a copy goes to the Minneapolis office?

(Testimony of Dale Cockayne.)

A. Yes, sir.

Q. And a copy maintained in Denver?

A. Yes, sir.

Q. Are these records made up daily by the Denver office? A. No, sir.

Q. They are made up daily, however, by the business office here in Great Falls? A. Yes, sir.

Q. Covering all three departments?

A. Yes, sir.

Q. And at least at the end of every month a copy of the month's business, record of the month's business, including income and expenses is sent to you?

A. Yes, sir.

Q. And that is what we have here on this table?

A. Yes.

Q. Covering the period 1943, I think you said, down to sometime in 1949?

A. Yes, sir, that is true.

The Court: We will take a recess. (3:20 p.m.)

(Court resumed, pursuant to recess, at 3:45 o'clock p.m., at which time all parties and counsel were present.)

### DALE COCKAYNE

resumed the stand and testified as follows:

#### Cross-Examination (Continued)

By Mr. Hall:

Q. Mr. Cockayne, was there a cash register in

(Testimony of Dale Cockayne.)

the small warehouse across the alley from the main store? A. At times there was, yes.

Q. During the busy season? A. Yes.

Q. Otherwise all the cash transactions were handled in the department store? A. Yes, sir.

Q. And when there wasn't a cash register there the sales slip was made out in the warehouse?

A. Yes.

Q. And brought across the alley to the main store? A. Yes.

Q. And there the transaction was completed?

A. Yes, sir.

Q. And that was true for the greater part of each year? A. Yes, sir.

Q. Who handled the advertising for the Gamble operation here? A. I did.

Q. You were the advertising manager as well as the—

A. No, Gordon Williams does our advertising for us but it was under my supervision.

Q. All advertising was under your direct supervision? A. Yes, sir.

Q. And you assisted, did you, in getting out that advertising? A. Occasionally, yes, sir. [96]

\* \* \*

Q. Will you give me the net amount of wholesale sales made by department No. 1 for the month of June, 1949? A. \$834.97.

Q. That is \$834.97? A. Right.

Q. And the net retail sales \$48,605.04, and those

(Testimony of Dale Cockayne.)

are totals which we would use in ascertaining the 2% rental, are they not?

A. No, sir, they are not.

Q. All right, now what would you eliminate from those [97] totals? A. The wholesale sales.

Q. And why do you eliminate entirely the wholesale sales?

A. It is so stipulated in the lease.

Q. What do you mean by that, Mr. Cockayne?

A. As I understand it, I am not a leaseman.

Q. I understand but I just wanted an explanation from you what you mean that they were eliminated from the lease terms?

A. First, it is a sale to another Gamble store.

Q. Let me ask you about that, Mr. Cockayne, there are more than one variety of what we call Gamble stores, are there not?

A. Yes, that is true.

Q. There are the regular Gamble Stores operated by Gamble-Skogmo, such as the Great Falls store? A. Yes.

Q. And various places in Montana and elsewhere? A. Yes.

Q. In addition there are smaller stores operated by individual owners on some sort of franchise arrangement to use the Gamble name? A. Yes.

Q. Now how do you designate between those two stores in your wholesale sales?

A. Well, these wholesale sales here, Mr. Hall, would represent sales to that type store.

Q. Which type store, to a dealer type store, that

(Testimony of Dale Cockayne.)

is, an individual? A. Owned store. [98]

Q. Not owned by Gamble?

A. No, sir. A Gamble store. A transfer of merchandise to a Gamble store is merely an inventory control problem. In other words, if I transfer a set of tires, or a refrigerator would be a better example, from here to Havre, it is taken from my inventory and is put on the Havre inventory.

Q. Let me ask you this question. Is the Havre store the same species as the Great Falls store?

A. Yes, sir.

Q. Now let's go to some smaller place where there is a dealer, an individual person operating under the Gamble name? A. Yes.

Q. Can you give me one?

A. Yes, Fort Benton.

Q. Fort Benton? A. Yes.

Q. And does this represent any transfers to such a dealer? A. Yes, it does.

Q. And did you exclude that from the goods under the 2% rental provision?

A. Yes, that is what this sale here is sales to those stores.

Q. To that species of stores?

A. Yes, sir.

Q. Not to the regular Gamble-Skogmo stores?

A. Yes, sir.

Q. You said yes, sir?

A. This is sales represented to a dealer sale.

Q. Operating under the name of Gamble? [99]

A. Operating under the name of Gamble and

(Testimony of Dale Cockayne.)

does not represent transfers of merchandise to any branch store. [100]

\* \* \*

Q. In your direct examination you spoke of the costs which were charged against the various departments, do you recall that? A. Yes.

Q. I think you said there was a cost set up for bookkeeping? A. Yes.

Q. Well, that isn't an actual payment, is it? That is just a bookkeeping transaction; that is, one department doesn't pay somebody else for keeping books for it?

A. Well, let me say, and I think I said this morning, our purpose in keeping the three sets of books is to know exactly where we are on those three different units at all times.

Q. In other words, you want to see if any particular unit is operating at a loss? A. Yes.

Q. And if it is operating at a profit, what the profit is? A. Right.

Q. But that is all compiled in the one store operation, is it not?

A. Yes, I would say that it is.

Q. In other words, you don't actually charge for your department No. 5 so much for keeping books, except as a bookkeeping transaction?

A. That is true.

Q. The money you take in from the three departments goes into one pot, does it not?

A. Yes, sir.

Q. As a matter of fact, Department No. 5 never

(Testimony of Dale Cockayne.)

had [101] any bank account, did it, during the entire time it was in operation?

A. I can't say this for sure, however, I think it did have. On the origination of several of those departments entirely separate bank accounts, separate manager, separate everything was set up at some of the points.

Q. Where, in Great Falls?

A. I don't know whether it was here or not.

Q. I simply glanced at a large number of these sheets and department No. 5 was without a bank account.

A. You could tell from there very quickly.

Q. Did department No. 2 have a bank account?

A. Not since I have been here.

Q. I am talking about all of them.

A. Yes, sir.

Q. Just one store has a bank account?

A. Yes.

Q. Out of that you are paid? A. Yes.

Q. Advertising paid? A. Yes.

Q. All costs of operation paid? A. Yes.

\* \* \*

### DALE COCKAYNE

#### Redirect Examination

By Mr. Williams: [102]

Q. Mr. Cockayne, you testified a few minutes ago on cross-examination that the warehouse on First Avenue North, which is not the premises involved

(Testimony of Dale Cockayne.)  
in this lease, occasionally stored tractor tires, did you not? A. Yes, I did.

Q. Would you state that some of those tires were occasionally sold under department No. 1, which is the department store?

A. The tractor tires belonged to department 1 and were sold in the department store.

Q. As such then do I understand the tractor tires are not farm implements or farm parts and are not part of unit 5?

A. That is true. Unit 5 consists of implements and parts for the implements that are sold.

Q. I understand that occasionally tractors come equipped with tires, as such are they considered, are the tires considered part of unit 1 or part of unit 5?

A. Unit 5.

Q. I believe you stated on direct examination that there had never been an item of unit 5 sold in the department store?

A. That is true. [103]

\* \* \*

Q. I believe you stated on cross-examination that all orders went through the business office in the department store?

A. Merely for the purpose of mailing, yes.

Q. What is the situation on orders, what was the situation upon farm store orders?

A. The same.

Q. What do you mean by the same?

A. That they were just dropped in the mail basket and taken to the post office with the rest of the letters.

(Testimony of Dale Cockayne.)

Q. Who writes up the orders on farm store orders?

A. I can better say Al approves them.

Q. By Al, you mean Al Hunt, the farm store manager? A. Yes, sir.

Q. After he approves them, what does he do with them? A. Puts them in the mail.

Q. In a sealed envelope?

A. I can't answer that, Carter.

Q. What I am getting at, do you yourself supervise or make out these orders on farm store purchases? A. No, sir, I do not.

Q. Do I understand you to say when they go through the business office they are merely dropped in the mail bag there [104] and not examined by you personally? A. That is true.

Q. I believe you stated on cross-examination that the employees who worked for the farm store were paid and the checks made out in the business office located in the department store?

A. That is correct.

Q. Who determines how large or how small those checks are?

A. Al Hunt. He keeps the time for them and turns it in and the girl writes the checks, and I sign them or Bob Grubber would sign them.

Q. Then the only thing in that procedure is merely the stenographic work of writing the checks and the formal signature? A. That is true.

Q. Do you know the approximate total square

(Testimony of Dale Cockayne.)

feet involved in the department store leased by that written lease dated December 27th, 1943?

A. Oh, I would say approximately 20,000 square feet.

Q. And how many square feet are in the business office which we have been discussing, composing the manager's office, sales office and credit office?

A. I would say it is approximately ten by thirty, about 300 square feet.

Q. Does the farm store have a connection with any other part of the department store except the business office? Does [105] it transact business with any other branch or unit of the department store located at 521 Central Avenue?

A. No, sir, it does not.

Q. There has been some discussion here of wholesale sales, does the Great Falls Gambles store have a general wholesale business?

A. No, sir. We frown on what we already have.

Q. And what is the nature of your wholesale business?

A. I can best tell you that, Carter, by attempting to explain how we function. We have a warehouse in Billings, which is set up to take care of these dealer operations around through the territory, and we also draw our own merchandise from that warehouse. We draw some of our merchandise; the balance of it, of course, comes direct from the vendors. The sales that we make to dealer stores, as we call them, are sales sometimes on merchandise in which we are overloaded on and are extremely

(Testimony of Dale Cockayne.)

anxious just to get our money back out, or a sale when he becomes distressed. In other words, a man will write down or call up and say, rush me out a tire or tires, from Fort Benton so we will put a tire on the bus and he will have it in Fort Benton that evening. We do not encourage it in any way, shape or form because we are set up on that in Billings, and when you sell it at wholesale prices you can't run a retail store and do it, and it is merely an accommodation and we frown on it [106] except when we are overloaded on merchandise and attempt to sell it to them just to get our money back, which has happened in this store, but it isn't a common practice. We don't like the business and we don't want it.

Q. Does the Great Falls Gamble store make any profit?

A. Actually you lose money; that is why I say we don't want it.

Q. As I have understood you these sales are all transfers of merchandise to the other Gamble stores, is that correct?

A. Other Gamble dealer stores.

Q. Do these Gamble dealer stores bear the name of Gambles? A. Yes, sir, they do.

Q. Without exception? A. Yes, sir.

Q. I believe you stated that the part of the book-keeping expense was charged to unit 5, is that correct?

A. As close as humanly possible we charge all the expense to the store involved, yes, sir.

(Testimony of Dale Cockayne.)

Q. And also you stated all the money went into a common fund? A. That is true.

Q. After the money goes into the fund here what happens to it? A. It is put in the bank.

Q. And from there where does it go?

A. The transfer checks are now to Continental Illinois Bank in Chicago. I believe that changes periodically but I think that is right. [107]

\* \* \*

### DALE COCKAYNE

#### Recross-Examination

By Mr. Hall:

Q. As I understand you, Mr. Cockayne, you say during the period of time you have been manager tractor tires have been stored in the small warehouse across the alley from time to time?

A. In some cases, yes.

Q. Yes, and that those tires belonged to department No. 1? A. Yes, sir.

Q. And you did tell me that furniture had been?

A. Yes, sir.

Q. And was now being stored there?

A. Yes, that is true.

Q. And that belongs to department No. 1?

A. Yes, sir.

Q. And has at all times belonged to department No. 1? [108]

\* \* \*

Q. Now a question or two I intended to ask you

(Testimony of Dale Cockayne.)

on your original cross. You said that Gamble-Skogmo had quit the farm department?

A. Here in Great Falls, yes, sir.

Q. Only in Great Falls?

A. Yes, sir. [109]

Q. They are still operating the farm department elsewhere? A. Yes.

Mr. Hall: I think that is all.

### DALE COCKAYNE

#### Re-redirect Examination

\* \* \*

Q. You stated on cross-examination that the amount which was expended for remodeling would ultimately go to McNair Realty Company at the termination of the lease in 1954, would it not?

A. Yes, sir.

Q. I believe you also stated on direct examination that that amount expended for prepaid leasehold or improving the premises was amortized during the life of the lease, was that correct?

A. Yes, sir, that is true.

Q. Then what would be the status of that account when the lease terminated by its own terms of 1954?

A. It automatically would have amortized itself off. Actually we call it a part of our rent is actually what it amounts to.

Q. Would you explain that statement? [110]

A. Assuming we spent to make it easier figuring \$5,000 and we had a five-year lease on a building in which we paid \$1,000 a year rent through the

(Testimony of Dale Cockayne.)

actual lease with that our rent would be \$2,000 a year, so come the end of the five years the work we had done would have automatically amortized itself off and so far as we are concerned would have been paid for.

Q. But if the lease were terminated prior to the expiration?

A. Then you would have lost that amount of money, that is true.

Q. I also understand that when the lease would terminate by its own terms Gamble-Skogmo would have the cost and expense of removing the fixtures, is that right? A. That is true.

Q. What would be the situation as far as the amortization of those items at the termination of the lease?

A. Well, it would be the same as the prepaid lease, Carter. In other words, there is a difference in the way those two accounts are amortized off, I believe. I think Mr. Hill can give you the exact way that is done. I do know the prepaid leasehold is amortized over the time of the lease and fixtures and furniture amortized over a ten-year period.

Q. And if the lease terminated by its natural terms in [111] 1954, you would then have had four years more use of those fixtures, is that correct?

A. That is true.

Q. And to a large extent they would be written off your books? A. That is all.

\* \* \*

DALE COCKAYNE

Re-recross-Examination

By Mr. Hall:

Q. This amortization matter is purely and simply a matter of bookkeeping, isn't it?

A. Yes, sir, it is.

Q. You just take an arbitrary amount and charge it off each year?

A. Not an arbitrary amount, Mr. Hall. If we spent so much money, of course, for tax purposes and so forth you have to be actually careful there so it is charged off during or over the life of the lease.

Q. But you won't over amortize for tax purposes, is that true? A. That is true.

Q. And that is included in the item shown upon these store statements and included in the items in store statements under light and heat?

A. No, it is in on prepaid leasehold about four columns up from the bottom. Account [112] 259.

ALVIN HUNT

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name? A. Alvin Hunt.

Q. Where do you reside?

A. 1703-2nd Avenue North.

Q. In Great Falls?

(Testimony of Alvin Hunt.)

A. In Great Falls, yes, sir.

Q. How many years have you lived in Great Falls, Montana?

A. I have lived in Great Falls, Montana, since 1942.

Q. Where did you reside before that?

A. At Belt, Montana.

Q. For how many years?

A. From 1939 until 1942.

Q. What is your present occupation?

A. My present occupation up to date is still farm store manager for Gamble-Skogmo.

Q. Is that your official title?

A. That is my official title.

Q. And when did you become the farm store manager for Gamble-Skogmo, Inc.?

A. January 1, 1948. [113]

Q. Had you worked in the Gamble farm store prior to that time? A. Yes, I had.

Q. For how long?

A. In the spring of 1947.

Q. That was when you started?

A. When I first started for Gamble-Skogmo, yes.

Q. And how long have you been employed by the Gamble store in Great Falls, Montana?

A. Since I believe in September of 1946.

Q. Flat how many years have you been involved in the sale of farm machinery?

A. Since January 1, 1948.

Q. Prior to that what were the nature of your duties?

(Testimony of Alvin Hunt.)

A. I done service work on farm machinery after it went out to the customer and set it up and helped unload it from the cars and such work as that.

Q. Do you know when the farm store started operating in Great Falls, Montana?

A. Sometime in the early part of 1947.

Q. When you went to work for Gambles in the spring of 1947 what premises were being used for farm sales?

A. Well, the warehouse in the alley directly behind the department store was used for repair parts and the lot behind the store was also used for storing and for displaying of farm machinery.

Q. Just a minute. When you say the lot behind the store do you mean the lot which faces on First Avenue North? [114]

A. That is correct. The address would be about 520 First Avenue North, I suppose.

Q. What other property was being used for farm sales?

A. The other property used was a lot rented from the International people on First or Second Avenue South. I don't know exactly what the address would be. That lot was mostly used to set up and get the machines ready. It was unloaded there from the cars and set up for delivery to farmers, or to the lot on 520 First Avenue North.

Q. What premises have been used recently for the storage and display of farm store items?

A. For the last two years there has been used the property directly back of the store on 520 First

(Testimony of Alvin Hunt.)

Avenue North, using the warehouse and that lot, and also a large warehouse and lot at 23rd Street and 9th Avenue North, which was rented from Roy Anderson.

Q. Where are the parts to the farm implements stored and sold?

A. The parts were stored and sold from the building directly back of the store or lot that would be known as 520 First Avenue North.

Q. And where have the heavy implements under the farm store been displayed and sold?

A. They are displayed and sold in part back of the store on that lot, 520 First Avenue North, and also from the [115] warehouse and lot at Roy Anderson's at 23rd Street and 9th Avenue North.

Q. How far is the lot that you lease from Roy Anderson from the department store?

A. It is approximately two miles.

Q. Is Gamble-Skogmo, Inc., still in the business of selling farm store items?

A. Gamble-Skogmo, yes, are still selling farm machinery, but not in Great Falls.

Q. When was the farm store in Great Falls discontinued? A. About thirty days ago.

Q. So that, although you still have the title as farm store manager, you no longer have a farm store, is that correct? A. That is correct.

Q. Would you tell the court the manner in which a normal routine sale would take place of a farm store item?

A. Well, the normal routine sale, cash sale of

(Testimony of Alvin Hunt.)

a piece of machinery, generally the customer comes into the store and is interested in the type of machines and the price and so forth, and wants to see the machine, so he is taken out and shown the machine, shown how the machine is operated, and after the sale is made the sales slip is written up and the cash is received from the customer, and arrangements for the delivery of the machine is made. And after that machine has been delivered or after the sale has been completed, and if [116] I happened to have made the sale myself, I took the money sometime during the day and turned it in with a duplicate copy of the sales slip to the main office to be banked.

A. Now you understand that on the books there is a unit 5; is unit 5 the same as the farm store items?

A. Unit 5 is the farm store items, definitely.

Q. Has the farm store sold any items other than unit 5? A. No, they haven't.

Q. Have any items of unit 5 been sold elsewhere than in the farm store? A. No, they haven't.

Q. During the time that you have been acquainted with the farm store operations here in Great Falls, has any item of unit 5 been stored or displayed in the department store at 521, 523, 525 Central Avenue?

A. No, sir, there has never been any implements of any type stored or sold from that store.

Q. Briefly, what is the general nature of the items you sell in the farm store?

## (Testimony of Alvin Hunt.)

A. Well, the items we sell in the farm store would be combines, tractors, plows, mowing machines and siderakes, and naturally those machines after they have been in the field have to be repaired, so there have to be repair parts stocked and sold to keep these machines in operation, and that is what unit 5 consists of.

Q. During the operation of the farm store when you were [117] in charge, where were your headquarters?

A. My headquarters were in the building on the alley on 520 First Avenue North.

Q. Did you have an office in that building?

A. I had an office in that building, yes.

Q. Did you do any book work in that building?

A. I done all my book work in that building.

Q. During the time you were manager, did you have occasion to have anybody working for you?

A. Yes.

Q. How many employees have you had working for you?

A. Well, the amount would vary, depending on the season. In the busiest season we had an average of about 5 or 6, and other times there would be one or two.

Q. Did you have any outside salesmen who were selling farm store items? A. Yes.

Q. To whom did they report?

A. They reported to me.

Q. Were you responsible for their actions?

A. Right.

(Testimony of Alvin Hunt.)

Q. Did they ever have occasion to report to the department store?

A. No, they didn't have any occasion to, because they were instructed to report to me.

Q. In the farm store did you have occasion to hire men to assemble the farm implements?

A. I had occasion to hire men to assemble the farm [118] implements, yes.

Q. Where was that work done?

A. At 23rd Street and Ninth Avenue North, at the Roy Anderson property.

Q. Under your supervision? A. Right.

Q. Did you have any occasion to have any mechanics repair farm implements? A. Yes.

Q. Where was that work done?

A. That was done at 9th Avenue and 23rd Street North.

Q. And if the implement had been sold and was on the farmer's premises, did the farm store still handle repairs on those? A. Yes.

Q. Was that under your supervision?

A. That was under my supervision.

Q. Who had the authority to hire and fire all these employees?

A. I had the authority at all times to hire and fire the employees.

Q. Did you have a telephone?

A. There was a telephone at 23rd Street and 9th Avenue North.

Q. Was that an extension of the phone of the department store?

(Testimony of Alvin Hunt.)

A. No, it wasn't an extension of the phone of the department store because, if it had been, you would have to make [119] calls through the store to get outside, and you could make calls long distance or any place from that phone.

Q. Under whose supervision were you?

A. I was under Mr. Cockayne's supervision.

Q. Did you have any other supervision?

A. Mr. Joe McNutt, District Manager.

Q. Where is his office? A. Billings.

Q. Did you have any other supervisors?

A. Mr. Phil Blicken of Denver.

Q. You stated that there has never been an item of unit 5 or a farm store item sold or displayed on the department store premises; would it be possible to display a farm implement there?

A. It would be possible, but you would run into such expense to get it in through the doors. The doors were too small and it would have to be torn down completely and reassembled in the department store, and the department store would not have floor space to warrant such a deal of displaying farm machinery inside the building.

Q. I believe you stated when you were describing the normal sale that the prospective purchaser would find you in the store, or some other salesman; were you referring to the department store?

A. I was referring to the farm store. I fell heir to a little sign up over this warehouse, "Gambles Farm Implements," [120] and that is what I considered a store when I am talking about a store.

(Testimony of Alvin Hunt.)

Q. Did you ever make the first contact with a prospective purchaser in the department store?

A. That was possible that I could have been in the store sometime during the lunch hour or eating my lunch or something to that effect, and a person probably contact me at that time, yes.

Q. Do you remember any occasion when you were in the department store on business and contacted a prospective purchaser?

A. Not anything, any definite deal, no.

Q. As I understand it, after you have demonstrated and the prospective purchaser has agreed to buy a farm implement and you are ready to complete the sale, that is done where?

A. Well, it just depends on where we were at. I have completed a good many sales in my own automobile. I have completed them in this warehouse on 520 First Avenue North, and I have completed them in the lot behind this building, and also the Roy Anderson warehouse at 23rd Street and 9th Avenue North.

Q. Now from the time the prospective purchaser is first contacted until the sale is completed, what part of the transaction takes place in the department store?      A. There is none. [121]

\* \* \*

Q. Now you stated a minute ago that the merchandise was delivered to the customer; who made those deliveries?      A. Some of the outside men.

Q. Were they working for the farm store or department?

(Testimony of Alvin Hunt.)

A. They were working for the farm store.

Q. Do you know of anything any employee of the department store delivered a farm store item?

A. No, there never was any time when an employee of the department store delivered any items from the farm department.

Q. I understand now that the part of the bookkeeping for the farm store was done by the business office in the department store; is that correct?

A. That is correct to the extent of taking care of the sales and making an accounting of it. That part of the bookkeeping, that was all that was done in the office.

Q. Was the farm store charged for a share of the bookkeeping operation?

A. That is correct. [122]

Q. Was the farm store charged for any other items of expense on the department store?

A. No, I don't believe it was.

Q. You didn't pay any on lights of the department store? A. No.

Q. Or for any of their fixtures? A. No.

Q. Or for any of their rent? A. No.

Q. Now what basis were you paid upon?

A. Monthly salary.

Q. Did you receive or were you entitled to receive a commission or profit?

A. I was entitled to receive a commission if—

Q. If—

A. If the profits warranted it, yes.

(Testimony of Alvin Hunt.)

Q. Your profit was determined, was it not, after all the expenses were deducted?

A. That is correct.

Q. One of those expenses was rent, was it not?

A. That is right.

Q. During the time you were the manager of the farm store [123] you did pay rent for the premises which you have described as 520 First Avenue North and the Anderson warehouse?

A. That is right.

Q. And if the farm store had paid rent for any other premises, that would have decreased your chance of obtaining a commission? A. Yes.

Q. Is that right? A. That is very correct.

Mr. Williams: That is all.

### AL HUNT

#### Cross-Examination

By Mr. Hall:

Q. Did you ever receive a commission?

A. No, I didn't.

Q. How much was the farm store charged for bookkeeping?

A. As to that figure exactly, I couldn't tell you.

Q. Well, you really know nothing about it, do you, Mr. Hunt?

A. Well, yes, to the extent as far as the office work was concerned in the department store I had nothing to do with that.

Q. You had nothing to do with the bookkeeping, did you?

(Testimony of Alvin Hunt.)

A. I had nothing to do with the bookkeeping of the department store, no. [124]

Q. Or of the farm store?

A. Yes, I had to a certain extent; not to the handling of the cash and rectifying the profits I did not.

Q. All you had to do as far as any form of bookkeeping was to keep stock records in the warehouse?

A. Stock records and making up orders.

Q. That wouldn't be bookkeeping, would it?

A. I don't know why it wouldn't be, you have to keep a record of it.

Q. By the way, what did you do with your orders after you made them out in the warehouse?

A. They were made out and put into an envelope and put into the mail box in the department store.

Q. Did you ever have them checked over by Mr. Cockayne?

A. Mr. Cockayne didn't check the orders.

Q. Never did?

A. No, didn't check the orders.

Q. Now was there anything stored out there in that warehouse besides farm implements?

A. Yes, there were other items stored out there.

Q. Quite a lot of furniture stored out there?

A. Yes.

Q. Tires? A. Tires.

Q. In other words, the department store was

(Testimony of Alvin Hunt.)

making use of that warehouse at all times, wasn't it? A. Yes, they were making use of it.

Q. That is true at the present time, isn't it? Are you [125] employed out there now?

A. No, I am not employed out there now.

Q. Where are you working?

A. I have been working part time in Havre and part time in the department store this last month, this last few weeks of the month.

Q. In the main store? A. Occasionally.

Q. And you are still working in the capacity as manager of the farm department?

A. Well, I couldn't be because I don't have any farm store.

Q. I misunderstood you; I thought you said you were still manager of the farm department?

A. I am still manager of the farm department but I don't have any farm store here at the present time.

Q. So you have been transferred to the main store?

A. I have been transferred to the main [126] store.

\* \* \*

Q. Did you have anything to do with the getting up of the advertising for the farm department?

A. I helped with it, yes.

Q. And I assume you are familiar with that advertising over a period of three years?

A. Yes, I am familiar with it.

Q. And you will recall that in all cases the

(Testimony of Alvin Hunt.)

farm machinery or implements advertised were advertised at 521, 523, 525 Central Avenue?

Q. Well, I don't know. If the address was always on all [127] the items from what they were, yes.

Q. Whenever there was an address on, that was the address?

A. That was the address, that is right.

Q. And the only phone number given was 4384, which is the phone in the store at 521, 523, 525 Central Avenue, you know that, do you not, Mr. Hunt? A. Yes.

Q. Are these farm trailers considered as farm implements? A. Definitely.

Q. They are? A. That is right.

Q. And how about hydraulic manure spreaders, are they farm implements?

A. They are farm implements also.

Q. And was there a downstairs store in the main building there at Gambles?

A. In which store, the department store?

Q. Yes, what they call the downstairs store, isn't it? A. Yes.

Q. Were any of these farm implements ever displayed down there for sale? A. No, sir.

Q. Do you recall any advertisements in the papers in which they were advertised for sale in the downstairs store?

A. What do you mean by that, where it had been down in the—

Q. What did you say?

(Testimony of Alvin Hunt.)

A. What do you mean by that? [128]

Q. An advertisement in the Great Falls Tribune advertising these items that I have just talked to you about for sale in the downstairs store?

A. No, sir.

Q. You say there never was any such advertising? A. No, sir. [129]

\* \* \*

Q. But all of the employees including yourself were paid out of the main store, were they not?

A. That is correct.

Q. Now in all cases all cash which was taken in by the farm department was taken to the business office, was it not?

A. That is right.

Q. That is, you didn't maintain any bank account for the farm department? A. No.

Q. And you drew, as I understood Mr. Cockayne's testimony, a small amount of money for petty cash each day, which amount or what was left of it was returned after the close of the business day, was it not? A. That is right.

Q. And you had no means during the lax part of each year of taking care of any cash in the small warehouse, did you? A. That is right.

Q. And I think Mr. Cockayne said that during the very busy period there was a cash register kept there? A. That is right.

Q. For two or three months, would that be about right? A. That is about right.

Q. Otherwise money and the large checks es-

(Testimony of Alvin Hunt.)

pecially were [130] taken immediately, were they not, into the business office?

A. That is correct.

Q. Do you recall of any customers being sent from the main store across the alley to the small warehouse?

A. Oh, I have an idea that there were some; as to any specific deal or customer, I don't remember of any. I suppose there were some that were told where they would find me or where we done our farm business.

Q. That would be the natural assumption if the advertisements directed the customers to the main store, wouldn't it? A. It would be, yes.

Q. Now when certain items were taken out to the country for delivery, how was that delivery made, Mr. Hunt?

A. Well, it depended on the type of machine. if it was a combine, it was driven out, or a tractor, driven out providing it wasn't too far; and other items which couldn't be driven out or too far to drive the other items, a truck would be hired, Great Falls Transfer or someone to take this out to the farmer.

Q. And who paid for the truck?

A. The expense came out of the farm store division and was paid out of the office.

Q. Paid out of the business office?

A. Paid out of the business office.

Q. And afterwards charged against the farm department? [131]

(Testimony of Alvin Hunt.)

A. Farm department. [132]

\* \* \*

ROBERT F. PAPPIN

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q. What is your name?

A. Robert F. Pappin.

Q. Where do you reside, Mr. Pappin?

A. 2301 Seventh Avenue North in Great Falls.

Q. How long have you resided in Great Falls?

A. All my life with the exception when I was in the Army and in college.

Q. What is your present occupation?

A. General contractor.

Q. How long have you been working in the contracting business?

A. Well off and on ever since I was out of high school, [133] about fifteen years.

Q. Were you in the contracting business in 1946? A. Yes, sir.

Q. With what company were you connected in 1946? A. Floyd Pappin and Son.

Q. Are you then a son of Floyd Pappin and Son; that is, are you a member of that company?

A. Yes, sir.

Q. What is your official title?

A. I was the secretary-treasurer of the corporation.

(Testimony of Robert F. Pappin.)

Q. Was that in 1946? A. Yes, sir.

Q. At that time in 1946, what were the duties of your job?

A. I did the estimating and the contacting of the people that we were doing work for and lining up the work for the superintendents.

Q. In doing this estimating, was it necessary for you to inspect the premises on which you were going to do some work? A. Yes, sir.

Q. In the year of 1946, did your firm, Floyd Pappin and Son, have occasion to do any work on the premises known as Gamble's store known as 521, 523, 525 Central Avenue?

A. The Gamble stores, yes, sir.

Q. And did you investigate the premises and make the preparations to line up that work?

A. Yes, sir.

Q. In investigating the premises, did you investigate [134] the basement floor?

A. Yes, sir.

Q. What was the condition of the basement floor in 1946 prior to the time that you started doing some work on it?

Mr. Hall: To which the defendant objects upon the grounds and reasons that it is immaterial and illustrates no issue in this case.

The Court: What is the purpose of it?

Mr. Williams: The purpose is we are interested in proving that the plaintiff has expended over \$20,000.00 in improving the premises in question approximately three years ago, and then suddenly

(Testimony of Robert F. Pappin.)

three years later their lease is, it is attempted to terminate their lease.

The Court: It might be an element that will enter into it. I will let you make the showing subject to your objection.

Mr. Hall: And may I have an objection to this line without constantly making objections?

The Court: It will be understood.

\* \* \*

A. When we were called to go down to make the estimate on the work that we later did, we inspected the floor. In the north, excuse me, in the southeast corner of the building, [135] due to a gumbo and water condition this floor had heaved in some places as much as three inches.

Q. Were there cracks in this floor?

A. Yes.

Q. Was it in a condition it could be used as a store floor? A. No, sir.

Q. I understand that your company put in a sump pump on these premises in 1944?

A. That is my understanding; I wasn't here in 1944.

Q. And what did you do in connection with this basement floor in the Gamble store?

A. Well, we removed the existing floor, the floor that existed at that time and installed drain tile to the sump pump from the corner of the boiler room to the sump pump, and also from the northeast corner to the sump pump and each wall to the

(Testimony of Robert F. Pappin.)

sump pump draining the area so any further water that would get in there would be drained away.

Q. In other words, you put in practically an entire floor? A. All except the boiler room.

Q. What type floor was that?

A. Reinforced concrete.

Q. At the time you were doing this work, who hired you to do it? A. Gamble-Skogmo.

Q. And what representative of Gamble-Skogmo?

A. Mr. Bill Hill.

Q. Is that the same Bill Hill that sits on my left? [136] A. Yes.

Q. Will you tell the court very briefly, Mr. Pappin, what other work was done at the Gamble store by your company in 1946?

A. We removed a tile partition in the basement. We closed up an existing stairway and installed a new stairway according to their directions, and we rewired the basement for light outlets they designated removed and replaced the steam lines and roof drain lines which were in the basement to another location to gain head room, and built a balcony.

Q. By the gained head room you mean there wasn't sufficient head room in the basement prior to the time you—

A. The drain and steam pipes ran beside this tile wall and as long as the tile wall was in there the head room was sufficient, but when the tile wall was removed the pipes hung down below the beam. Then we built an extension to the balcony

(Testimony of Robert F. Pappin.)

on the main floor and installed some fixtures for the company, and built a balcony in what we call the farm store which is across the alley and re-decorated the entire store.

Q. Did you install a lunch counter?

A. Yes, sir.

Q. Shoe department?

A. We installed the shelving for the shoe department.

Q. Did you do any plastering?

A. Patching.

Q. What was the total bill for these services?

A. \$21,607.40. [137]

Q. And was that paid for by Gamble-Skogmo?

A. Yes. [138]

\* \* \*

### WILLIAM T. HILL

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Williams:

Q. What is your name?

A. William T. Hill.

Q. What is your residence?

A. Minneapolis, Minnesota.

Q. What is your age, Mr. Hill?

A. Forty-six.

Q. What is your present occupation?

A. Manager of the real estate department for

(Testimony of William T. Hill.)

Gamble-Skogmo, Inc., Minneapolis, [139] Minnesota.

Q. How long have you been manager of the real estate department?

A. Approximately 11 months.

Q. How long have you worked for Gamble-Skogmo, Inc.? A. Five years.

Q. What did you do prior to the time you worked for Gamble-Skogmo, Inc.?

A. I was employed by a large midwest grocery chain in the same capacity for ten years.

Q. What were the nature of your duties and the work you did the 10 years prior to the time you started to work for Gamble-Skogmo, Inc.?

A. I was charged with the responsibility of managing the real estate department in a supervisory capacity and the construction of store lay-out, building design and purchase of fixtures.

Q. What are your duties at the present time?

A. My duties are confined to lease negotiations, the administrative work incurred in the real estate department such as renewals of existing leases, exploring new locations, handling all warehouse leases, any railroad sites which we have on lease.

Q. Have you been in the lease department ever since you were connected with Gamble-Skogmo, Inc.? A. I have, yes, sir.

Q. How many premises does your department lease or how [140] many has your department a lease on at the present time?

(Testimony of William T. Hill.)

A. 352 retail store buildings and 5 warehouse operations in the eastern division.

Q. And you are in charge of the eastern division, are you? A. That is correct, yes, sir.

Q. Who is in charge of the eastern division of the lease department in December, 1943?

A. M. F. Hoben.

Q. Was he in charge from the time from 1943 until the time you took over? A. Yes, sir.

Q. Are you acquainted with the lease dated December 27th, 1943, which has been introduced in evidence as Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Was that drawn up under the supervision of Mr. Hoben? A. Yes, sir.

Q. Is Mr. Hoben here today?

A. No, he is not.

Q. Was it possible for him to be here?

A. It wouldn't be possible for him to be here under any circumstances because of his physical condition. He has had both legs amputated.

Q. Do you know if McNair Realty Company has been advised that Mr. Hoben has had both legs amputated? A. Yes, they have.

Q. Does the lease department under your charge have the duties and responsibility of making the rental payments on your leases?

A. Yes, sir. [141]

Q. On all leases in your department?

A. On all leases in our department.

Q. Does your department have charge and re-

(Testimony of William T. Hill.)

sponsibility of making the rental payments on the lease involved in this lawsuit? A. Yes, sir.

Q. Does your lease department have other so-called percentage leases? A. Yes, sir.

Q. How many other percentage leases are there?

A. Approximately 120-125.

Q. In which Gamble-Skogmo, Inc., is the tenant and of which you have charge?

A. Approximately 125.

Q. When you say that there are approximately 125 percentage leases, what do you mean by percentage lease?

A. A percentage lease is based on net retail sales, fundamentally a guaranteed minimum with a percentage over and above a stipulated amount.

Q. Am I to understand you then that the plaintiff Gamble-Skogmo, Inc., has approximately 125 leases in which a percentage is paid on net retail sales? A. That is correct, yes, sir.

Q. Does your company have a uniform policy in determining the net retail sales?

A. Yes, sir.

Q. And how are the net retail sales determined?

A. The net retail sales are determined by the computation [142] of gross sales of each individual retail operation from which are deducted the repossessions, return of sales, discount sales to employees and wholesale sales.

Q. Are contracting sales also?

A. And contracting sales also, pardon me.

Q. What is the condition of transfer of mer-

(Testimony of William T. Hill.)

chandise to other stores, is that included in net retail sales?

A. Well, that is a bookkeeping program.

Q. Is that same system used to determine the net retail sales with all of these leases?

A. Yes, sir.

Q. Will you tell the court whether or not you have a policy and a uniform system in determining the actual rent figure and in making out the rental check?

A. Yes, sir, we do have. That initiates or originates through the sales and expense records supplied by that retail store. Those records are forwarded daily to a regional office situated in various parts of the Country. They in turn transmit those figures on a regular form for the purpose of establishing a record in the home office at Minneapolis as well as the retail store and the regional office. From that record our retail sales are established in the home office division for the purpose of computing the percentage lease, or by that I mean where the percentage lease exists. The accounting department computes those figures and supplies the real estate department with the final figures, at which time we prepare a [143] requisition for accrued rental check; that in turn is attached to a letter of transmittal and forwarded to each property owner or landlord where such a lease exists.

Q. Who signs the letter of transmittal?

A. I do, sir.

Q. As I understand it, you also at the present

(Testimony of William T. Hill.)

time make the check requisition or somebody in your department does, is that correct?

A. Yes, sir, that is correct.

Q. And that check requisition is based on figures furnished you by the accounting department?

A. That is correct, yes, sir.

Q. Was this same procedure followed in December of 1943? A. Yes, sir.

Q. I understand you did not come to work until sometime in 1944; how do you know the procedure was followed in 1943?

A. From the records I have available in each file.

Q. Is this procedure followed on all of your approximately other 125 stores with a percentage lease? A. Yes, sir.

Q. Has it been acceptable to your other landlords? A. Yes, sir.

Q. In the inception of your lease, was that procedure followed with McNair Realty Company?

A. Yes, sir.

Q. Is that procedure now followed with McNair Realty [144] Company? A. Yes, sir.

Q. Is that procedure now followed with McNair Realty Company?

A. No, it is not. At the present time the procedure is followed identically; however, this lease now requires a certified quarterly report by the month be furnished to the McNair Realty Company, and that in turn requires the signature of an officer or the comptroller or the company, but this is the

(Testimony of William T. Hill.)

exception and the only instance in which we have that situation.

Q. Then as I understand that you follow the same procedure with the addition that your accounting is certified by the comptroller, is that correct?

A. That is correct.

Q. Is that the only change?

A. That is the only change.

Q. In other words, the McNair Realty Company gets all the rest of the accounting plus this certification by the comptroller?

A. Yes, sir, that is correct.

Q. I believe you stated a few moments ago the lease now requires that this be certified by the comptroller, has there been a change in the terms of the lease?

A. Not by the lease instrument, only through correspondence with McNair Realty [145] Company.

Q. In other words, McNair Realty Company wrote a letter asking that it be certified?

Mr. Hall: Just a minute. We object to the evidence of contents of letters here.

The Court: Well, it is repetition of this situation of certification.

Q. Do your records, Mr. Hill, disclose when Gamble-Skogmo, Inc., started into the farm store business?

A. Our records, yes, the departmental records indicate we started in the farm store business late in 1946.

(Testimony of William T. Hill.)

Q. Is that throughout Gamble-Skogmo, Inc., or in Great Falls?

A. That applies throughout the Gamble-Skogmo operation.

Q. Approximately when did the farm, your records show that the farm store started in Great Falls, Montana?

A. About January 1st of 1947.

Q. Do your records show whether or not the Gamble-Skogmo, Inc., was in the farm store business in December, 1943? A. No, they do not.

Q. Was any Gamble-Skogmo, Inc., store throughout the United States in the farm store business in 1943? A. No, sir.

Q. In what year did you make your contract with Cockshutt Manufacturing Company to start manufacturing farm equipment and parts?

A. That was sometime in 1945.

Q. So insofar as the factor is concerned, you really [146] started in the farm business in 1945?

A. To the best of my knowledge, the franchise was executed in 1945 and the activity and realty for the installation and operation started in 1946.

Q. Since 1946 when the farm stores started, how many farm stores have been installed by Gamble-Skogmo, Inc.? A. Eighteen.

Q. Is Great Falls one of those eighteen?

A. Yes, sir.

Q. Does the plaintiff Gamble-Skogmo, Inc., have a policy as to whether or not farm stores should

(Testimony of William T. Hill.)

be set up as a branch or department store or as a separate store?

A. The policy of the company is to have them set up as a separate operation.

Q. Does the company have a policy whether these stores shall be on a percentage basis or a flat rental basis?

A. In all instances established agreements by contract or lease are on a flat rental basis.

Q. Are there any exceptions to this?

A. Yes, we have two exceptions which are situated, one in Montana, Havre, and one in Norfolk, Nebraska, and that developed because of previous commitments by lease before the inception of the farm machinery operation and because of the ability of our company to house the farm implement business in the building which we have previously committed ourselves to. They are operated in the same four walls as a retail store. [147]

Q. But you stated that these two are an exception to your general policy?

A. They are an exception.

Q. And the other fifteen or sixteen are in accord with that policy? A. That is correct.

Q. Does your company have a policy as to whether or not the bookkeeping of the farm store is done by the main store?

A. The bookkeeping is channeled through the main store offices.

Q. Does the company have a policy as to whether or not the management of and the manager of the

(Testimony of William T. Hill.)

main store will have partial supervision over the farm store manager?

A. At the present time the manager of the main store, retail store does have responsibility of some supervision over the farm machinery operation.

Q. Does your company have a policy as to whether or not the farm stores should pay any part of the rent of the main store?

A. No, they have a definite policy in respect to that. We do not pay any part of the rental.

Q. At the time when the farm store was started in Great Falls, Montana, which I believe you testified was early in 1947, was it possible to put the farm implements and establish the farm store in the premises which were already leased from McNair Realty Company under that lease [148] dated December 23, 1943?

A. No, sir, it would have not have been possible.

Q. Was it necessary to lease other property to install a farm store? A. Yes, that is correct.

Q. What other property was leased?

A. Well, there was trackage leased from the C. M. St. P. & P. R. R. trackage site, International Harvester, Roy Anderson property, and the property belonging to the McNair Realty Company, located on approximately 520 First Avenue [149] North.

\* \* \*

Q. On what basis was the rent paid on these other properties, on a percentage basis or a flat rental basis? A. Flat rental basis.

(Testimony of William T. Hill.)

Q. Do you have a written lease on these other premises? A. No, sir, we do not have.

Q. Do you have an oral lease on these other premises?

A. There are no leases. The agreements are generally reached by the local management and the company policy requires that the stores in most instances make their own arrangements. The managers of the retail stores make their own arrangements on a month to month basis for such facilities.

Q. Do your records disclose what the total rent is which you have paid for the other properties leased under farm store operations?

A. Yes, sir.

Q. What is that figure? A. \$6,973.26.

Q. Do your records disclose what the total sales are of the farm store here in Great Falls, Montana?

A. Yes, sir.

Q. And what is that? A. \$259,320.40.

Q. As the manager of the rent department from the headquarters at Minneapolis, Minnesota, do you have access to the sales records of the Gamble store in Great Falls, Montana? A. Yes, sir.

Q. Are those sales records prepared in the normal course of business of Gamble-Skogmo, Inc.?

A. Yes, sir.

Q. Were the sales records in Great Falls, Montana, [150] prepared in the normal course of business of Gamble-Skogmo? A. Yes, sir.

Q. Can you tell the court what the per cent of the rent which has been paid on all the farm store

(Testimony of William T. Hill.)

property to date is to the total sales of farm store properties?

A. Yes, sir, 2.68% against total sales.

Q. If 2% were paid to McNair Realty Company upon the farm store sales, what would be the total rental percentage on farm store property in Great Falls, Montana? A. 4.68%.

Q. Does your company have a policy of maximum percentage rental? A. Yes, sir.

Q. What is the maximum rental which the company will pay on a percentage basis?

A. 2½%.

Q. Do you have any leases in which you pay more than 2½%? A. No, sir.

Q. Are you authorized to enter into any lease in which you pay a rental of more than 2½%?

A. No, sir.

Q. Has McNair Realty Company ever claimed a rental of 2% on the farm store sales?

A. Yes, sir.

Q. Has McNair Realty Company claimed that they are entitled to the possession of the premises involved in the lease dated December 27?

A. Yes, sir.

Q. What is the position of Gamble-Skogmo, Inc., as to that contention, and does Gamble-Skogmo, Inc., admit that the [151] defendant is entitled to possession of those premises? A. No, sir.

Q. Does Gamble-Skogmo, Inc., contend that the written lease dated December 27th is not terminated?

(Testimony of William T. Hill.)

A. Will you repeat that, please? Well, they contend that it was not terminated.

Q. By "they" do you mean Gamble-Skogmo?

A. Gamble-Skogmo, Inc.

Q. Do you understand that the defendant has given Gamble-Skogmo, Inc., a letter advising them that the rental on those premises will be at the rate of \$300.00 per day? A. Yes, sir.

Q. Has Gamble-Skogmo, Inc., ever agreed to that rental? A. No, sir.

Q. Are you acquainted with those premises in question? A. Yes, sir.

Q. Are you acquainted with rental conditions in Great Falls and throughout the Country?

A. Yes, sir.

Q. Would the rental of \$300.00 a day be a reasonable rental? A. It would not be.

Q. What would be a reasonable rental on those premises?

A. \$450.00 per month plus percentage basically 2%.

Q. When you say \$450.00 per month plus 2%, do you establish a minimum before the 2% started to apply?

A. The minimum at \$450.00 a month or \$5400.00 annually.

Q. And when would the percentage start to apply on a [152] reasonable rental?

A. Over and above \$270,000.00 volume net retail sales.

Q. Do your records disclose whether or not

(Testimony of William T. Hill.)

any repairs were made by the Gamble-Skogmo store in 1944?

A. Yes, we do have a record of expenditure in 1944 of certain minor alterations to the store front and entrance and the mezzanine balcony situated in the back of the building in the amount of \$3151.00, plus an additional \$218.00, as I recall.

Q. Do you have your records with you?

A. I have the records, yes, sir.

Q. What was the exact amount paid for repairs and improvements by Gamble-Skogmo, Inc., in 1944? A. \$3,368.07.

Q. As I understand you you stated at one time that as part of your job you have supervision of purchasing of fixtures and construction work, is that correct?

A. That was prior to my employment with Gamble-Skogmo, Inc.

Q. At the present time do you have such duties?

A. No, sir.

Q. When you were out here in—were you out here in 1946?

A. I was, yes, sir, on several occasions.

Q. Did you do any negotiating with Bob Pappin with regard to construction? A. Yes, sir.

Q. Was that in line with your duty? [153]

A. I was responsible for that work at that time. I handled the entire transaction and supervised the alterations and the repairs in connection with Pappin.

Q. Will you tell the court briefly what the con-

(Testimony of William T. Hill.)

dition of the premises was and in particular the basement floor prior to the time that work was done in 1946?

Mr. Hall: May I ask counsel a question, your Honor, upon this line of examination?

The Court: Yes.

Mr. Hall: Is it your theory, Mr. Williams, there was an obligation on the part of the lessor to do it?

Mr. Williams: No, that is not my theory.

Mr. Hall: In other words, the situation is, is it not, that this was done for the benefit of Gambles, the lease providing exactly what the lessor and the lessee were to do in connection with the remodeling work or repair work, and I can't see how it illustrates any issue in the case. That is the reason I am asking counsel these questions, your Honor. [154]

\* \* \*

A. Well the basement area was not suited for retail merchandising and we originally thought that we could make certain repairs to the basement slab but upon examination and removal of certain portions of the slab we found there was hydrostatic pressure which caused the heaving of the floor and as a result we advised Pappin to remove 80% of the existing slab and replace it with required drain tile for the purpose of draining off any surplus water which would cause any further damage, and that in turn was drained into sumps and removed automatically by the pumps.

Q. Will you tell the court briefly what other repairs and improvements were put in in 1946?

## (Testimony of William T. Hill.)

A. Yes. The wiring as a whole was completely replaced both in the basement and ground floor, the new customers' stairway installed to the basement area, the basement area 80% covered with asphalt tile, and there were other repairs made, removal of partial partition in the basement so that we had one complete span for sales area, and complete redecorating job throughout.

Q. What was the total amount expended on these improvements? A. \$26,342.46. [155]

Q. Now as I understand you this is amortized off during the life of the lease, is that correct?

A. That is correct.

Q. What is the balance that has not been amortized off as of November 30, 1949.

A. \$14,923.89.

Q. Where did you obtain that figure, Mr. Hill?

A. That is obtainable from two sources, both our store statement, which incidentally this figure was taken from, and the accounting department in Minneapolis, Gamble-Skogmo.

Q. If the lease were terminated, what would be the effect on the unused portion of these and not amortized portion of these repairs?

A. It would represent a total loss.

Q. What are some of the other effects upon the Gamble store in Great Falls, Montana, in the event of a sudden termination of their lease?

A. Well the expense involved for the removal of the merchandise, dismantling fixtures, shipment and reprocessing of all fixtures and merchandise,

(Testimony of William T. Hill.)

plus the loss of a capable and proven sales staff of people in excess of 40.

Q. Do your records show the amount expended on fixtures by Gamble-Skogmo, Inc., since 1944?

A. Yes, sir.

Q. What is that figure?

A. That amount is \$87,107.99.

Q. And how is that amortized or figured on your bookkeeping?

A. That is amortized over a period of ten years, the [156] fixture account.

Q. And by amortized over a period of ten years I assume that in merchandising you figure you use up a portion of it each year as each year's expense, is that correct?

A. That is correct.

Q. What do your records show as the balance which has not yet been amortized as of November 30th, 1949?

A. \$55,187.40.

Q. In the event of the termination of the lease suddenly what would happen to the furniture and fixtures?

A. Well it would be necessary to discard them entirely, crate them, reship them to our furniture factory in Fergus Falls, Minnesota. There might, however, be a few of them that would be reused in other stores as replacements throughout this region.

Q. Have you done any investigating to determine whether or not there is another available

(Testimony of William T. Hill.)

site for Gamble-Skogmo, Inc., to put in a department store in Great Falls, Montana?

A. Yes, sir, I have explored but there are none available at the present time.

Q. Approximately how long would it take you to outfit another Gamble-Skogmo department store and set it up in business?

A. Sixty to ninety days approximately.

Q. Are there any other effects on Gamble-Skogmo, Inc., of a sudden termination of their lease? [157]

A. Yes, its taken considerable time to build up a good will and enjoy volume in sales closely approaching profit.

Q. What would happen to the accounts receivable if the lease were suddenly terminated?

A. Well it would necessitate a representative of Gamble-Skogmo remaining in Great Falls for collection purposes.

Q. Whereas if the lease continues that can be handled by the normal operation of the business?

A. That is correct.

Q. You understand that McNair Realty Company has made a claim for back rent, is that correct? A. Yes, sir, that is true.

Q. Now, if this court or another court of competent jurisdiction decides that you owe, that Gamble-Skogmo, Inc., owes the defendant McNair Realty Company some back rent, is the plaintiff Gamble-Skogmo, Inc., ready, willing and able to

(Testimony of William T. Hill.)

make full compensation for that rent with interest, costs and damages?

A. Yes, sir, Gamble-Skogmo are ready and willing to compensate in the event the court decides.

Q. In full? A. In full.

Q. And that compensation would include rent, interest, costs and damages, would it?

A. Correct, yes, sir.

Q. Is this in any way an admission that the plaintiff Gamble-Skogmo, Inc., now owes the defendant any sum of money [158] for rental or damages? A. No, sir.

Mr. Williams: That is all.

#### Cross-Examination

By Mr. Hall:

Q. May I see your authority for making that statement, Mr. Hill, please?

A. My authority?

Q. Yes.

A. I can't show you anything in writing, Mr. Hall.

Q. Well who authorized you to make that statement? A. Gamble-Skogmo, Inc.

Q. And who in that corporation authorized you?

A. W. P. Berghuis, E. Pennoch, W. J. Larson.

Q. Mr. Berghuis is general counsel of the corporation, is he not? A. That is correct.

Q. And who is Mr. Pennoch?

A. He is one of the Vice Presidents.

(Testimony of William T. Hill.)

Q. And who is the other?

A. W. J. Larson.

Q. Yes.

A. He is also one of the Vice Presidents in charge of operations.

Q. But you have nothing in writing from the corporation in connection with that matter?

A. No, I do not.

Q. That is purely oral statements made by these officers to you?

A. Yes, sir, that is correct. [159]

Q. You are the manager of the real estate department as I understand it?

A. Yes, sir, that is right.

Q. And have been for a period of approximately eleven months? A. Yes.

Q. And as manager of that department you succeeded Mr. M. F. or Mike F. Hoben?

A. Yes.

Q. It was Mr. Hoben who negotiated on behalf of Gamble-Skogmo, Inc., the lease here involved?

A. Yes, sir.

Q. What are your duties and what is your authority as manager of the real estate department with respect to leases, Mr. Hill?

A. Well I am authorized to negotiate for leases on any new locations or renewals of existing locations subject to the approval of two or more officers of our company.

Q. And what two officers of the company do you now have to contact in order to get approval of your negotiations?

(Testimony of William T. Hill.)

A. W. J. Larson, E. Pennock and W. P. Berg-huis.

Q. That is two out of the three?

A. Two of the three.

Q. I take it then where you have negotiated a lease that the matter is then taken up with either all three or two of the three officers and their approval eiher obtained or not obtained.

A. Yes, sir, that is correct.

Q. And do you have any other authority in connection with your duties as manager of the real estate department? [160]

A. Well my signature is accepted for payment of rental checks and I negotiate with railroads in respect to warehouse space and explore new locations in general.

Q. Do you have anything to do with the adjustment of complaints and controversies arising in connection with leases?

A. Yes, sir, subject to the officers' final approval.

Q. Well sometimes I take it you have authority that is prior authority to adjust differences arising out of leases and things of that character?

A. Providing it has been discussed and approved by the same group mentioned.

Q. Now as I understand it the real estate department of Gamble-Skogmo is charged with the duty of paying rents on all of the leases?

A. That is charged with the duty. The checks are not issued or signed by the real estate depart-

(Testimony of William T. Hill.)

ment but the records kept for payment of rentals is transferred to the department which makes out the checks.

Q. Do you keep records with reference to payment of percentage rentals, that is, the real estate department?

A. We keep the records in a cardex file which indicates the time each accrued rental check is due and payable to the landlord.

Q. But not as to the amount?

A. Not as to the amount. The amount is computed by the [161] accounting department.

Q. Yes. A. That is correct.

Q. And the check is transmitted, as I understand it, from the accounting department to the real estate department?

A. The figures by record are transmitted to the real estate department, who in turn accepts those as true figures, and we in turn issue a form which is a check requisition form that is signed by me and sent to the department which issues the checks.

Q. And then the check is retransmitted to the real estate department and sent out by the real estate department with a letter of transmittal, is that correct?

A. That is correct, yes, sir, on percentage leases.

Q. Well that is what I am talking about, percentage leases. A. Yes.

Q. Now are all your percentage leases based entirely upon net retail sales? A. Yes, sir.

Q. No mention made of wholesale sales at all?

(Testimony of William T. Hill.)

A. Only in this instance.

Q. This is the only instance?

A. The only instance.

Q. So that this lease does vary from other percentage leases in that respect, does it not?

A. Yes, sir.

Q. In calling for a percentage for the wholesale sales? A. That is correct. [162]

Q. In addition to net retail sales?

A. Yes, sir.

Q. Now are your leases uniform with respect to the accounting periods?

A. No, they are not.

Q. You are familiar with the fact that the accounting period under the lease here involved is quarterly income? A. Yes, sir.

Q. Would that mean to you that an accounting is to be made of the wholesale and net retail sales for the prior quarter? A. Yes, sir.

Q. And if there is a rental payable on the basis of the lease that is a percentage rental that a check should accompany that account, is that correct?

A. That is correct.

Q. Well now what sort of an accounting should be made under a lease of this character which requires a quarterly accounting?

A. Well that originates from sales records and expenses in the retail store which it covers. That in turn is forwarded to Denver to the retail office daily. They transcribe that on a regular form which is provided showing all of the other inci-

(Testimony of William T. Hill.)

dental, profits and otherwise, a copy of which is sent to the Minneapolis home office division of Gamble-Skogmo, Inc., upon which the accounting department computes quarterly, semi-annually or annual sales.

Q. And these daily accountings made by the store and then sent to Denver and by Denver to the office in Minneapolis [163] are these sheets here that Mr. Cockayne was testifying from, are they not? A. That is correct.

Q. And are available both to the Minneapolis office and Denver regional office daily?

A. Those sheets are not prepared daily. The sales records from the store as well as the expense items are forwarded to Denver. These are monthly statements, Mr. Hall.

Q. So that sometime right after the end of each quarter the Minneapolis office has a full and complete accounting of all sales made?

A. That is correct.

Q. Of wholesale or retail?

A. That is correct.

Q. In all of the departments of each individual store, that is the situation?

A. That is correct, yes, sir.

Q. Now what did Gamble-Skogmo mean by a quarterly accounting to be rendered to McNair Realty?

A. In each three months a transmittal would be forwarded to McNair Realty indicating the

(Testimony of William T. Hill.)

sales required or accomplished in that period of time.

Q. Would that be just a letter from the real estate department? A. Just a letter.

Q. Saying sales have been so much?

A. Yes, sir.

Q. And that would be your idea of an accounting? A. Yes, sir.

Q. No mention being made as I understand you how that figure was reached? [164]

A. Well it isn't the general practice, Mr. Hall.

Q. That is it isn't the general practice of Gamble-Skogmo you mean? A. That is correct.

Q. Well it is a fact, is it not, Mr. Hill, that McNair Realty Company complained from time to time with reference to the sketchy accountings that were being furnished to it? A. Yes, sir.

Q. By Gamble-Skogmo?

A. That is correct.

Q. And from time to time have various requests for additional figures so they could arrive at some conclusion, you recall that, do you not?

A. I recall that. I cannot recall all the correspondence that might have occurred prior to the time I was appointed manager of the real estate department.

Q. Well do you recall too, Mr. Hill, that these accountings were delayed for months and months at a time?

A. I can recall the instance of the correspond-

(Testimony of William T. Hill.)

ence which I had with the McNair Realty Company.

Q. I think you are now directing my attention to an incident that happened in 1948 when over a period of several months complaints were made by the McNair Realty Company, not only about the accountings furnished but about the amounts of the checks furnished, and it took quite a lengthy period of time before a final check for the true amount due under the percentage rental was finally reached, do you recall that? [165]

A. Definitely.

Q. And was that the instance you were talking about? A. That is correct.

Q. But you are not familiar with the situation in connection with these accountings in 1945, 1946 and 1947, is that the situation?

A. From the correspondence which I have read I am familiar up to a point which is available to me, Mr. Hall.

Q. As a result as I understand you of the complaints made by McNair Realty Company the Gamble-Skogmo has been furnishing for sometime a certified quarterly report?

A. Yes, sir, that is correct.

Q. And how long has that been true?

A. It has been true about one year.

Q. Now there were additional complaints made by the McNair Realty Company with reference to the accountings furnished and particularly with reference to the farm department sales, were there not? A. That is correct.

(Testimony of William T. Hill.)

Q. And when did those complaints commence if you now recall?

A. In 1948 to the best of my recollection.

Q. And about what time in 1948?

A. Oh, sometime in August or September, I believe.

Q. Do you have any of those letters with you from the McNair Realty Company in which the complaints in reference to the accounting of the farm department sales started? [166]

A. Yes, I do have.

Q. I have asked you to produce certain letters, some of which have to do with that matter? [167]

\* \* \*

Q. Now you told me I believe, Mr. Hill, that sometime in 1948 there arose quite a controversy with reference to the accountings being furnished by Gamble-Skogmo to the McNair Realty for the percentage rental? A. Yes, sir.

Q. And the checks which were being received?

A. Yes, sir.

Q. And various letters passed, did they not, between McNair Realty Company and Gamble-Skogmo in connection with that matter?

A. Yes, sir.

Q. Look will you please, Mr. Hill, at letters which have been marked for identification purposes Defendant's proposed Exhibit 3 and Defendant's proposed Exhibit 4, and state whether or not those letters have reference to the complaints made by

(Testimony of William T. Hill.)

McNair Realty Company concerning the matter which you and I have been discussing?

A. This one, Mr. Hall. [168]

Q. Of September 29th, that is Defendant's Exhibit 3?

A. This one doesn't have reference to the incident or correspondence which—

Q. Exhibit 4 does not have reference to that particular controversy existing between McNair Realty Company with reference to making accountings and the checks being received, Exhibit 4 does not refer to that matter?

A. Yes, it does.

Mr. Hall: We offer in evidence Defendant's proposed Exhibits 3 and 4.

Q. By the way, Mr. Hill, both of those letters have been produced from your files, have they not, at my request? A. Yes.

Mr. Williams: We have no objection.

The Court: They may be received in evidence. What numbers are they?

Mr. Hall: Defendant's Exhibit 3, your Honor, and Defendant's Exhibit 4.

The Court: They may be received in evidence.

Mr. Hall: And deemed read?

The Court: And deemed read.

Whereupon said Defendant's Exhibit No. 3, offered and received in evidence is in words and figures, as follows, to wit:

(Testimony of William T. Hill.)

## DEFENDANT'S EXHIBIT No. 3

B. P. McNair Company  
Established 1893  
Real Estate—Insurance  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

Sept. 29th, 1948

Gamble-Skogmo, Inc.,  
15 North 8th Street  
Minneapolis, Minn.

Attention: Mr. Mike F. Hoben.

Dear Mike:

This will acknowledge receipt of your letter of September 27th with explanation as to why all farm sales are excluded from your sales' reports.

I think that further clarification may be necessary for the reason that we both know that a great proportion of these farm sales originate in the premises leased to you under percentage arrangement. We would like to discuss the matter with you further and personally and when you are next in Great Falls.

At any rate we are glad to have some sort of explanation from you as heretofore we have been getting nothing but a run-around.

Mike, it is not pleasant for us to play the role of chronic complainers. It would be considerably better for both of us if your Company would arrange to [170] take care of this Great Falls lease

(Testimony of William T. Hill.)

promptly and properly. To bore you with a little recent history: On July 6th you sent us a statement which should have been received in June, with a check for \$192.46. After due complaint by us on July 12th, you sent a revised statement of amount due of \$1729.32. After further complaint by us on August 3rd you sent us still a third check in the amount of \$309.76. After two further complaints we eventually received, as of August 30th, another "final" statement. This is still unsatisfactory and after writing your department on September 4th and again on September 20th, we are finally in receipt of your own letter of the 27th.

This still does not appear satisfactory for the reason that we think you owe us \$1387.97, covering farm sales, unreported, for the period March, April and May, 1948.

Page No. Two.

Gamble-Skogmo, Inc.

Sept. 29, 1948

Our past experience has not been too happy and that is all we have to go on.

May I also point out that we are not as yet in receipt of any statement covering the sales period June, July and August, 1948.

Yours very truly,

B. P. MCNAIR COMPANY,  
By /s/ C. S. MCNAIR.

(Testimony of William T. Hill.)

Whereupon said Defendant's Exhibit No. 4, offered and received in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 4

B. P. McNair Company

Established 1893

Real Estate—Insurance

Great Falls, Montana

November 9, 1948

C. S. McNair

B. P. McNair, Jr.

Mr. W. P. Berghuis, General Counsel,  
Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minn.

Dear Sir:

We are in receipt of your letter of November 5th in answer to our letter of October 28th addressed to Mr. P. W. Skogmo.

Needless to say, we regret exceedingly, for Mr. Hoben's sake, the unfortunate fact of his illnesses and operations. Probably these difficulties would never have arisen if he had been able to continue in his office and with his former good health.

The situation exists, however, and the fact remains that we have no adequate responses to our various inquiries.

As you are undertaking to clear the matter up

(Testimony of William T. Hill.)

we will ask you to be specific in regard to the following: [172]

Certified sales reports for the two quarters, March, April, May and June, July and August of this year, broken down by months and with these totals listed:

- (a) Total gross sales.
- (b) Inter-store sales or transfers of merchandise.
- (c) Wholesale sales to employees or others.
- (d) So-called "farm sales" and whether or not these "farm sales" figures are included in computation for rent purposes.

Note: We have never yet had true certifications of any of your sales, simply getting vague letters, quoting some figures in an off-hand fashion. We are entitled to, and would like to receive sworn certifications.

We have also noted from your letter that according to your computations on wholesale sales to employees, we have been overpaid. If this proves to be the case, after we are in receipt of your full sales data, duly authenticated, we stand ready immediately to make a proper refund.

Meanwhile, we wish again to call your attention to the fifth paragraph of our letter of September 29th.

(Testimony of William T. Hill.)

Page Number Two

Mr. W. P. Berghuis

Nov. 8th, 1948

addressed to Mr. Hoben and which deals with unreported "farm sales" for the quarter, March, April and May of [173] 1948. This point on "farm sales" has not been explained to our satisfaction and no such sales have been reported to us, either formally, or informally, by your office. We feel that we are entitled to a report on these sales and to 2% rent on the net total. This letter constitutes a demand on your company for such reports and for the additional rental due under such sales.

As this is the last letter we intend to write you in the matter, we would suggest that in answering you will kindly be more specific.

Yours very truly,

McNAIR REALTY COMPANY.

(Testimony of William T. Hill.)

Whereupon said Defendant's Exhibit No. 5, offered and received in evidence, is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 5

C. S. McNair, W. Robt. Gilchrist, Manager, B. P.  
McNair. [175]

Established 1893  
B. P. McNair Company  
Insurance in all lines  
Real Estate, Loans and Rentals  
First National Bank Building  
Phone 2-1094  
Great Falls, Montana

May 28, 1946

Mr. Mike F. Hoben,  
Real Estate Department,  
Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

Dear Mike:

The attached letters are self explanatory and this note is in no sense an apology.

From inception, our personal dealings with yourself and your company have been very pleasant, but from a business-wise standpoint, they have been far from satisfactory. Furthermore, as pointed out in our letter to Green, your sales have been highly disappointing. Something is seriously wrong with your store. Leslie's Ready-to-Wear on

(Testimony of William T. Hill.)

the corner, occupies one-sixth of the space that you do and has consistently paid us more rent than Gamble's.

With conditions as they now are, we would very much like to recapture your premises. Twenty-five feet in the same block has just been leased for ten years at a rental which figures \$900 per month including cash rent and tenant's improvements. You have seventy-five feet and we paid \$7,641.91 as our share of putting the premises in condition for you, at [176] the inception of the lease.

We still have faith, however, in Gamble's getting untracked and achieving a satisfactory operation in Great Falls. As I told you in 1944, we like to look at the long pull, but in this case something is radically wrong.

There is one other matter that should be attended to. My brother Ben had a distinct understanding with Mr. Hill at the time he superintended installation of the stairway to the basement and the removal of the tile basement partition, that a letter would be forthcoming from Gamble's to the effect that at the lease expiration these changes would be replaced at your expense if so desired by the landlord.

1

Mike, will you please be good enough not to let these matters drag, the warehouse lease, the corrected report on sales for both annual lease periods and this latest stairway and partition letter?

We are, frankly, very disappointed in our Gam-

(Testimony of William T. Hill.)

ble deal to date, but with personal regards to yourself and our other friends in the organization, we remain

Very truly yours,

B. P. MCNAIR COMPANY,

By /s/ CHET,

C. S. MCNAIR.

CSM:SHP [177]

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Q. (By Mr. Hall) Now when was it that you first knew the fact that the McNair Realty Company claimed a percentage of 2% on farm sales? Made by the farm department?

A. Late in 1948 to the best of my recollection.

Q. As I recall the farm store started its operation some time in 1947? A. Early in 1947.

Q. Was the claim made by McNair Realty Company with reference to this percentage in writing or was that an oral claim?

A. In writing, Mr. Hall.

Q. And do you recall what time in 1948 that that suggestion was first made?

A. No, sir, I don't. The latter part of 1948.

Q. As I understood you the maximum rental which the Gamble-Skogmo Company has according to its policy is 2½%? A. 2½%.

Q. Are some of the percentage rentals of other stores based upon that percentage?

A. Yes, sir.

Q. Now the percentage rental is a rental over and above the minimum rental, is it not?

A. Yes, sir.

(Testimony of William T. Hill.)

Q. You understand—

A. Basically they tie together; the minimum rental is based on  $2\frac{1}{2}$  in many instances, sometimes 2%.

Q. The lease here in question is based upon a minimum rental for a business of \$270,000.00?

A. Yes, sir. [178]

Q. That is \$5,400.00 per year? A. Yes.

Q. And then the percentage rental comes if the business done, the net retail sales are over and above \$270,000.00? A. Yes, sir.

Q. And that situation is true with reference to all of the leases, that is, the percentage leases which the Gamble-Skogmo Company has, is it not?

A. That is true with the exception of any of them that have a stipulation of a ceiling accrued rental or accrued rental I might state.

Q. That is you have a ceiling on the amount of percentage paid?

A. Yes, sir, that is correct.

Q. That isn't true in this particular lease?

A. No, sir.

Q. Did the controversy with reference to the payment of percentage of the farm store sales continue after 1948? A. Yes, sir.

Q. Continued down through 1949, did it not?

A. Yes, sir.

Q. And continued up until the time that the notice of termination was served upon Gamble-Skogmo? A. Yes, sir. [179]

(Testimony of William T. Hill.)

Redirect Examination

By Mr. Willams:

\* \* \*

Q. Following that what took place?

A. Well I had several discussions with Mr. McNair in his office principally which continued through the week until Friday afternoon.

Q. Was there ever another discussion in which Cleve Hall and I were present?

A. Yes, sir, there were just four of us present at that second meeting.

Q. And in the same discussion who else was present besides Cleve Hall and myself?

A. Mr. McNair and myself.

Q. At that time was there a second compromise offer made by Gamble-Skogmo, Inc.?

A. The second compromise offered.

Q. Yes, made by Gamble-Skogmo, Inc.?

A. Yes, at that time we agreed that.

Q. There was another compromise offer made?

A. That is correct.

Q. Who made that compromise offer?

A. You did. [181]

Q. And what were the terms of that offer?

A. Full 2% on net retail sales of farm machinery.

The Court: Just a moment. Let us understand. That 2% offer on farm machinery, sales of farm machinery was that with the understanding the old lease should be continued of December 27th, 1943?

(Testimony of William T. Hill.)

A. Yes, sir.

The Court: I see. Go ahead.

Q. Now you stated that 2% of farm sales would be paid, is that correct? A. That is correct.

Q. And what figure was that?

A. \$5,161.60.

Q. Was there any suggestion that if that figure was wrong, the correct figure would be paid?

A. That is correct.

Q. What was the offer in regard to future sales of farm store items?

A. We agreed to pay 2% for future sales as long as the farm machinery operation was in existence on Mr. McNair's property.

Q. Was there any offer made so far as sales reports were concerned?

A. Yes, we agreed to furnish certified monthly reports on net retail sales.

Q. And was that offer accepted?

A. No, sir. [182]

\* \* \*

#### Recross-Examination

By Mr. Hall:

Q. Do I understand now there never was agreement reached with reference to the payment of \$5,161.60?

A. That was to become a part of a new situation or we [183] tentatively agreed prior to that before we entered into negotiations for a new lease, \$5,100.00. As a matter of fact that was in your office.

(Testimony of William T. Hill.)

Q. That figure was agreed upon, was it not?

A. Yes.

The Court: I don't understand that situation. He said that wasn't agreed; it was categorically refused.

Mr. Hall: May it please the court, I can see where the court is confused. The offer that was categorically refused by Mr. McNair was the offer of one-half of \$5,161.60.

The Court: I see.

Mr. Hall: The figure \$5,161.60 had been arrived at by the use of these store records. I understand Mr. Williams used them in reaching that figure and that was accepted by the defendant as representing 2% of the farm sales.

The Court: And continue the old lease.

Mr. Hall: That was the proposition. The first proposal was one-half of \$5,161.60 and continue the old lease.

The Court: Well, now, then he offered the full amount, \$5,161.60?

Mr. Hall: That is what I understand.

The Court: And that was accepted by Mr. McNair?

Mr. Hall: That figure was accepted as we understand it.

The Court: Now what do you say about [184] that?

Mr. Williams: No, sir, that one, that was not accepted.

The Court: Did you offer one-half first?

(Testimony of William T. Hill.)

Mr. Williams: Yes, sir.

The Court: And continue the lease?

Mr. Williams: And continue the lease.

The Court: And then did you later offer the whole amount, \$5,161.60, whatever it is, and continue the lease?

Mr. Williams: Yes, sir.

The Court: And you say he categorically refused that?

A. Yes, sir.

The Court: All right, then I understand you.

Q. (By Mr. Hall): Now when was this second conversation in my office, Mr. Hill?

A. The second conversation?

Q. Yes.

A. The first meeting was the 25th; that would be the following morning.

Q. The following morning?

A. It seems to me it was.

Q. Well had you had any discussion with Mr. McNair after you left my office on October 25th with reference to either the payment of the 2% on the farm sales or a new lease?

A. Yes, I had. [185]

Q. Where did you have that conversation on the afternoon of October 25th?

A. Maybe that was in Mr. McNair's office, as I recall.

Q. Was that before or after you received this telegram? A. That was after.

(Testimony of William T. Hill.)

Q. And then after that discussion you came back up to my office the next morning, is that right?

A. As I recall we did, Mr. Hall.

Q. And there was a further discussion with reference to the payment of this \$5,161.60?

A. Yes, sir.

Q. Was there an agreement reached at that time with reference to that amount? A. No, sir.

Q. There was not. You then entered upon a discussion of a new lease, is that the situation?

A. With Mr. McNair.

Q. That is what I— A. Correct.

Q. As I understood you that discussion took place in my presence and in the presence of Mr. Williams in my office?

A. Only the \$5,161.00 but no discussion about new lease in your office except we all agreed Mr. McNair and I might possibly get together on another situation which would be satisfactory to both he and our company.

Q. On a new lease?

A. That is correct. [186]

Q. But you say now that you never did reach an agreement with reference to the payment of the \$5,161.60?

A. That was refused by Mr. McNair.

Q. Refused entirely?

A. Only in the event we could execute a new lease which would be acceptable to our Company with the \$5,161.00 being accepted by Mr. McNair.

(Testimony of William T. Hill.)

Q. Whereupon you started discussions with reference to a new lease? A. That is right.

Q. With the term to start on October 1st, 1949?

A. Well that was the time to commence which Mr. McNair requested, and from there what we talked about was a ten-year lease, no particular starting date except that particular date Mr. McNair brought out.

Q. Was that satisfactory to you?

A. I wasn't concerned about the starting date at that time.

Q. Now you said you were in Mr. William's office when he called me with reference to a compromise negotiation in my office?

A. That is correct.

Q. And did you hear him use those words, "compromise negotiation"?

A. I don't recall, Mr. Hall.

Q. Our discussion, that is, the discussion between myself and Mr. Williams was mostly with reference to your authority, was it not?

A. Principally, that is correct. [187]

Q. And it was during that conversation that he said: "Well, we have a checkbook." Do you recall that?

A. Not as I recall, I didn't hear the conversation on both ends of the phone, Mr. Hall. As I recall the statement came from you.

Q. Did you hear my conversation?

A. No, I did not.

Q. Well, didn't Mr. Williams tell me that, "We

(Testimony of William T. Hill.)

have the right to write a check for this farm rentals"? A. For a settlement.

Q. Well, he didn't give me any figures at all but he said you had authority to write a check, did he not? A. That is correct.

Q. And did you hear that I said to him, "Well, that is pretty good authority if you have the right to write a check"?

A. That was repeated. That I didn't hear it.

Q. Well, he repeated that to you?

A. That is correct.

Q. And when you came over to my office you had a checkbook with you, did you not?

A. Mr. Cockayne had it in his possession.

Mr. Hall: I think that is all.

Mr. Williams: I would like to ask one or two questions to see if we can clear this matter up. [188]

#### Re-redirect Examination

By Mr. Williams:

Q. At any time during this entire series of negotiations with McNair Realty Company did you ever make an offer to pay \$5,161.60 in the event McNair Realty Company insisted on termination of a lease dated December 27th, 1943?

A. No, sir.

Q. Each time that offer was made then it was with the understanding that the old lease would continue in effect? A. That is correct.

Mr. Williams: Plaintiff rests, your Honor.

The Court: Very well, Mr. Hall. [189]

Mr. Hall: I have about eight advertisements, may it please the court, to put in evidence, and if counsel will come over and look at them, then we will cut them out of the paper and have them marked.

Mr. Hall: We offer in evidence Defendant's proposed Exhibit 8.

Mr. Williams: We have no objection.

The Court: It may be received in evidence.

Mr. Hall: The court reporter can make copies of these, your Honor.

The Court: Very well.

Mr. Hall: We offer in evidence Defendant's proposed Exhibit 9.

Mr. Williams: No objection.

The Court: Received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 10 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received.

Mr. Hall: We offer in evidence proposed Exhibit 11 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received.

Mr. Hall: And I have selected about three advertisements for each year rather than try to put in any more. [190] We offer in evidence proposed Exhibit 12 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 13 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence proposed Exhibit 14 for the defendant.

Mr. Johnson: No objection.

The Court: It may be received in evidence.

Mr. Hall: We offer in evidence defendant's proposed Exhibit 15.

Mr. Johnson: No objection.

The Court: It may be received.

(Whereupon said Defendant's Exhibits Nos. 8 to 15, inclusive, offered and received in evidence, are a part of this record.) [191]

Mr. Hall: Call Mr. William Roberts.

### **WILLIAM B. ROBERTS**

was called as a witness for defendant, and having been first duly sworn, testified as follows:

#### **Direct Examination**

By Mr. Hall:

Q. State your name, please.

A. William B. Roberts.

Q. Where do you live?

A. 112-19th St. North, Great Falls, Montana.

Q. And what is your business?

A. I am employed by the B. P. McNair Company, agents for the McNair Realty Company.

Q. How long have you been so employed?

(Testimony of William B. Roberts.)

A. Since May, 1949.

Q. At my request have you made a check with reference to telephone number 6484?

A. I have.

Q. And what did you find?

A. I found through telephone books for 1938, 1947 and 1946 and back that there was no such number listed for Gamble farm store or anyone else connected with that type of business. The number belongs to a woman in Black Eagle who has had it since 1942.

Q. Did you make a search for any number for a Gambles store or warehouse located at 23rd Street on 9th Avenue North? [192] A. I did.

Q. Did you find any number?

A. I found nothing, neither to Gamble store or to agricultural implements.

Mr. Hall: You may cross-examine.

#### Cross-Examination

By Mr. Williams:

Q. In your research, Mr. Roberts, did you go to the telephone company? A. I did.

Q. Was there any number listed there under the name of Alvin Hunt?

A. I did not look for Alvin Hunt.

Q. Did you check the unlisted numbers in the telephone company?

A. They will not give you those.

Q. Then as far as your research is concerned it

(Testimony of William B. Roberts.)

is possible that there was an unlisted number for the Gamble farm store, is that correct?

A. There could have been.

Mr. Williams: That is all.

Mr. Hall: That is all.

### CHESTER McNAIR

was called as a witness, and having been first duly sworn, testified as follows: [193]

#### Direct Examination

By Mr. Hall:

Q. State your name, please.

A. Chester McNair.

Q. Where do you live, Mr. McNair?

A. Just outside of city limits of Great Falls to the south.

Q. You have lived here all your life, have you not? A. Yes.

Q. What is your business?

A. Real estate and insurance.

Q. And are you connected in any way with the McNair Realty Company? A. Yes.

Q. And in what capacity?

A. Stockholder, director and officer.

Q. And what officer? A. President.

Q. And McNair Realty Company is a corporation, is it not? A. It is a corporation.

Q. And how long have you been a stockholder, director and officer of that company?

A. Since it was incorporated in 1934.

(Testimony of Chester McNair.)

Q. You were also connected with the B. P. McNair Company, were you not? A. Yes, sir.

Q. I understand that to be a partnership?

A. That is a partnership.

Q. And are you one of the partners?

A. I am.

Q. The B. P. McNair Company was founded by your father, [194] B. P. McNair?

A. Originally.

Q. And has been in existence how long?

A. Since '93.

Q. Here in Great Falls?

A. Here in Great Falls.

Q. And during that entire time has the B. P. McNair Company and partners, that is, the two partners and the McNair Realty Company been in the real estate business here in Great Falls and in the surrounding country? A. Yes.

Q. How old are you, Mr. McNair?

A. Fifty-one.

Q. And how long have you been in the real estate business here in Great Falls?

A. Thirty years.

Q. The McNair Realty Company is the owner of a building located on the West half of Lot 8 and on Lot 9, Block 316 of original townsite of Great Falls, is it not? A. Yes.

Q. And in that building at the present time you have tenants? A. Yes.

Q. When I say "you," I mean McNair Realty?

A. That is right.

(Testimony of Chester McNair.)

Q. Who are the tenants?

A. Well, the portion of land description you give is occupied—the building covers more ground than that, but that portion is occupied by Gamble-Skogmo, Inc.

Q. That is what we call here in Great Falls as the Gamble Store? A. Yes. [195]

\* \* \*

Q. When did you first become acquainted with Gamble-Skogmo, Inc.?

A. With their representatives, purported representatives in the summer of 1943.

Q. And what was the occasion of your meeting them at that time?

A. One of their men came to our office to see whether or not they could rent a portion of this building you have been talking about for a Gamble store.

Q. By the way, was the portion now occupied by Gamble-Skogmo then leased to anyone else?

A. It was. The part of it was under lease to Safeway Food Stores; I forgot their corporate title.

Q. That is the grocery chain? A. Yes.

Q. Had the other part been leased?

A. The other part had been occupied and was just vacated by the New York Store, a furniture concern.

Q. I understand then that in the part of the building now occupied by Gamble-Skogmo there were two separate stores?

(Testimony of Chester McNair.)

A. Two separate stores.

Q. And did Gamble-Skogmo have a store here in Great Falls at the time the representatives came to see you? [196]

A. Yes, but not under that name.

Q. Under what name were they then operating?

A. They occupied a store further out on Central Avenue, a small store which was I believe known as Western Auto Supply.

Q. That was immediately adjoining the store owned by Victor Ario, was it not? A. Yes.

Q. And do you remember who the representative was that came to see you?

A. The first representative was a man by the name of Phil Chandler.

Q. And was he an officer of the corporation?

A. I doubt that. He was a merchandising man and told us that it was a little out of his department but that he wanted to learn whether or not the store premises could be had, and that he would have his real estate department if they were further interested, get in touch with us.

Q. And who was the next representative that got in touch with you? A. Mike F. Hoben.

Q. And he has been identified here as the predecessor manager of the real estate department of Gamble-Skogmo? A. That is right.

Q. Predecessor to Mr. William T. Hill?

A. That is right. [197]

Q. And did you enter into negotiations with him with respect to leasing the portion of the building?

(Testimony of Chester McNair.)

A. Yes, he came to Great Falls for that purpose.

Q. And did those negotiations ripen into the present lease, that is, the lease here under consideration dated December 27th, 1943?

A. Yes, they did.

Q. Now is this the first percentage lease that you have entered into here in Great Falls covering mercantile establishments? A. No.

Q. For how long a period of time have you negotiated and executed these percentage leases?

A. Somewhere close to 25 years.

Q. How many do you have in effect at the present time?

A. Well, through our office. Now you say me, do you mean McNair Realty?

Q. Either McNair Realty Company or leases handled by McNair Realty Company for clients?

A. Well, for the account of others, McNair Realty Company, we have eleven leases in effect at this time, in addition to the one that is under consideration here.

Q. What is the purpose of a percentage lease; why are they negotiated?

A. Well a percentage lease serves a peculiar purpose. In this wise it effects more nearly equitable partnership so to speak between landlord and tenant in this fashion, that [198] both participate in good business and to a degree both participate in poorer business. It is usually put into effect with a minimum guarantee which is designed to take

(Testimony of Chester McNair.)

care of certain fixed expenses, taxes, insurance and depreciation, repairs if you like, and thereafter there is a participation as between landlord and tenant with the ups and downs of fortunes in the business over an extended period of time. For instance, a landlord or tenant might be reluctant to tying himself over a ten-year period to a fixed flat rental. The landlord might be reluctant for the reason if the value of the premises went up he wouldn't be able to participate. The tenant would be reluctant because if the value goes down, he would still be tied to a higher flat rental, and so to iron out and make participation an equitable arrangement percentage leases are used and that gives stability over length of term to both.

Q. It is a compromise arrangement to take care of the goods years and bad years?

A. That is true.

Q. From the standpoint of the landlord as well as the tenant? A. That is right.

Q. And have the percentage leases generally speaking so far as your experience been operated successfully here in Great Falls?

A. I would say they are very successful in Great Falls.

Q. And did you go into all those matters with Mr. Hoben [199] during the negotiations you had with him in connection with this particular lease?

A. Yes, to some extent.

Q. And did you have any discussion with him with reference to how the percentage rentals were

(Testimony of Chester McNair.)

to be paid, that is, upon what basis they were to be made?

A. Oh, yes, it was agreed between us that they were to be, that sales were—that total sales were to be reported covering each quarterly period.

Q. And by total sales you mean all retail and wholesale sales made? A. All sales.

Mr. Williams: If the court please, we object to this line of testimony as varying and being in violation of the parol evidence rule. I believe it is an attempt here to vary the terms of the written lease. So far as an accounting is concerned the lease speaks for itself and it is in evidence.

Mr. Hall: We are not asking for an accounting.

Mr. Williams: No, but you are asking for the arrangements which were made and which were ultimately incorporated in the lease.

Mr. Hall: No. You are asking for an interpretation of an ambiguous clause; that is what I am going after.

The Court: Well, proceed and we will see.

Q. (By Mr. Hall): I believe you said the basis or payment of the [200] rentals was to be based upon all sales, was that the situation?

A. No accounting was to be made of all sales. The basis of the percentage, the payment in excess rental payment was to be based on certain of the total sales.

Q. And what sales was the percentage rental to be based upon?

(Testimony of Chester McNair.)

A. On retail, net retail sales and on net wholesale sales.

Q. And was there any discussion as to what net retail sales meant?

A. Yes, to this extent, it meant all sales to employees was taken up and it was mutually agreed those should be excluded. The matter of—you are confining this to retail sales?

Q. Yes. A. I believe that was all.

Q. What was there understood with reference to wholesale sales?

Mr. Williams: I object again, your Honor, on the ground that comes out there is violation of the parol evidence rule, and the lease very definitely provides what the terms of the lease are insofar as wholesale sales are concerned.

The Court: Yes, I think you are going beyond it all right. Sustain the objection.

Q. (By Mr. Hall): Well as a result of these negotiations and talks, as I understand it, the lease which is in evidence as Plaintiff's [201] Exhibit No. 1 was entered into between Gamble-Skogmo, Inc., and McNair Realty Company, is that the situation? A. That is right.

Q. Now did the Gamble-Skogmo, Inc., make the quarterly accountings to the McNair Realty Company? A. Occasionally.

Q. Well, what have you to say with reference to the first year of the lease?

A. No accounting was made until the lease year was fully concluded.

(Testimony of Chester McNair.)

Q. And what sort of accounting was made after the expiration of the first year?

A. We received a communication to the effect that the sales had not approached the point where there was any excess rental beyond the required minimum earning.

Q. Did you receive any accounting until you had made several requests for it? A. No.

Q. Or any record of that character?

A. No.

Q. And what have you to say with reference to the accountings for the second year of the lease?

A. I can't recall year by year without going to the files because one year varies with another but generally speaking we always had to write for accountings.

Q. And would the accountings be made promptly at the end of each quarter or what was the situation? [202]

A. No, they would drag anywhereas from six weeks to six months from the conclusion of any given quarter.

Q. And what sort of accountings were made generally speaking to McNair Realty Company of retail sales, total sales and wholesale sales?

A. None whatever as to that, as to any wholesale sales; some figures were given as to purporting to be net retail sales.

Q. And would that be in the form of letters or form of an accounting?

A. It would be in the form of a letter.

(Testimony of Chester McNair.)

Q. And was that situation true generally speaking until sometime let us say in 1948?

A. It was true at all times.

Q. Did the McNair Realty Company make complains from time to time with reference to the so-called accounts or accountings that were being furnished to them? A. A good many of them.

Q. And as a result did the method of accounting or furnishing these accountings become changed by the Gamble-Skogmo Company?

A. Yes, we had accountings, purported accountings made over so many different signatures and changed and corrected when we would call attention to them and then another accounting over an entirely different signature, that we finally [203] asked if this company would furnish us certified accountings signed by a responsible officer of the company.

Q. Well, was there a period which brought that matter to a head?

A. Yes, there was a particular period.

Q. And do you remember when that period was?

A. Yes, that was in the summer of 1948.

Q. And what was the experience of the McNair Realty Company at that time with reference to the furnishing of accountings as required by the lease and the payment of rental as required by the lease?

A. We—may I refer to some notes as to dates and etc.?

The Court: Yes, notes made by yourself.

A. Notes made by myself. We received a report in July of 1948. I don't know the date we received

(Testimony of Chester McNair.)

it. It was dated July 6th, reporting net retail sales of \$77,000.00.

Mr. Williams: Your Honor, I object to this line, this testimony. He is testifying as to an account. I do not know whether he has access to the account, and it is merely secondary evidence if the account is available.

Mr. Hall: May it please the court, upon counsel's demand I have turned these papers over to him; he has them all and if he will turn them back to me, I will give them to Mr. McNair.

The Court: All right, if you have got the property, [204] give it up.

Mr. Williams: I have it right here.

Q. (By Mr. Hall): What was the date, Mr. McNair? A. July 6th, 1948.

Mr. Williams: If the court please, there is going to be the line of testimony that is now directed as to the account which McNair Realty Company has received, and our objections to it, that is going to take a file covering correspondence from 1944 to the present time. I would be glad to stipulate with counsel for the defendant that all of those accounts may be introduced into evidence, and all letters written by both parties concerning the accounting and that that correspondence file may be introduced in evidence as one exhibit.

The Court: That would save a lot of time all right. What about that, Mr. Hall?

Mr. Hall: Very well, I will just put all these in evidence. Just have them marked.

The Court: You might just as well do that because by the time I get to consider it, I will have forgotten it. If you give it to me now and I will have to look at it if it is all compiled as exhibits.

Mr. Hall: Can we take a little time out now to have these marked? [205]

The Court: Yes, we will take fifteen minutes or what time needed and the Clerk can call me (3:15 p. m.)

(Court resumed, pursuant to recess, at 3:50 o'clock p.m., at which time the parties and all counsel were present.)

The Court: Do I understand this has to do with the original lease? What is the correspondence mainly about?

Mr. Hall: This bundle of correspondence, may it please the court, relates to the accountings made by the plaintiff Gamble-Skogmo, Inc., to McNair Realty Company in chronological order during the period from December 27th, 1943, to October of 1949, with the objections made from time to time by the McNair Realty Company or its agent, the B. P. McNair Company, with reference to the accountings, demands for accountings, and criticisms of accountings, and also complaints made with reference to the delay in making remittances and then questioning the amounts of remittances or having to do with the payment of percentage rentals under the lease of December 27th, 1943, and all of that correspondence has been given Exhibit No. 16 for defendant.

The Court: That contains the letters and answers.

Mr. Hall: With respect to the accountings and rental made. It is as I understand it as near as we can come to a complete file of original correspondence. [206]

The Court: Very well.

Mr. Hall: I now offer it in evidence.

Mr. Williams: If the court please, what is the corresponding date on that correspondence? What is the date of the last letter of that correspondence?

Mr. Hall: October 4th, 1949.

Mr. Williams: We will stipulate that that is a complete file of accounting and the defendant objects to the accounting and the plaintiff's answer to those objections from December 27, 1944, to October 4th, 1949.

The Court: Very well.

Mr. Hall: There has been no accounting made since October 4th, 1949.

The Court: It may be received in evidence and will be considered later by the court.

(Whereupon said Defendant's Exhibit No. 16, consisting of correspondence between the parties, offered and received in evidence, is in words and figures as follows, to wit:) [207]

## DEFENDANT'S EXHIBIT No. 16

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building

Great Falls, Montana.

November 15, 1944.

Mr. M. F. Hoben,

Gamble-Skogmo, Inc.,

700 Washington Avenue North,

Minneapolis, Minnesota.

Dear Mr. Hoben:

According to our lease with you on your Great Falls store, we are to receive from you a quarterly accounting together with check for excess sales. At the present time you have been operating here approximately six months and to date we have received no accounting or check. Undoubtedly this has been overlooked by your firm so would you please be good enough to send the first quarterly accounting together with check if any. Also make a notation so that in the future we will receive a quarterly accounting.

Chester has been laid-up with sinus trouble, the flu and has had his upper teeth removed so he has had a rather bad time lately.

Defendant's Exhibit No. 16—(Continued)

With best regards to all of you in which Chester joins, we are

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ B. P. McNAIR.

ew/ [208]

November 28, 1944.

M. F. Hoben,

B. P. McNair Company,  
1st Natl. Bank Bldg.,  
Great Falls, Montana.

Dear Mr. McNair:

Your letter of November 15th came while I was away from the office, and I am pleased to prepare and forward to you the report which you ask for.

Net retail sales for the quarter beginning March 1 and ending May 31 amounted to the small amount of \$11,394.29. This is because during most all of this period, we were still occupying the small Western Auto Store.

For the second quarter beginning June 1 and ending August 31, sales amounted to \$80,306.00. Thus total retail sales for the six months period amounted to \$91,700.29. Sales required to have paid additional rental would have had to exceed \$135,000.00 for the six months period, as it is based on total sales of \$270,000.00 per lease year.

With the ending of business on November 30th,

Defendant's Exhibit No. 16—(Continued)  
we will have the additional report for the third quarter which we will forward to you promptly.

Sales at the present time are running along on a satisfactory margin, and I am satisfied that the total sales for the lease year ending March 1st will be well into the bracket that will pay you additional rental. It appears that the first twelve month period will be handicapped because of [209] the long time it took to prepare the building, etc.

I was very sorry to learn of Chet's being laid up. Hope before this, he is fully recovered and his good self again. I had planned on visiting Great Falls this fall, but have been unable to due so.

I also hope that with the prospects of returning merchandise such as household appliances, radios, etc., that our sales will be of such a volume that our additional rental checks to you will be entirely satisfactory.

Kind personal regards and best wishes.

Sincerely yours,

GAMBLE-SKOGMO, INC.,  
Real Estate Department.

MFHoben:bg [210]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North  
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

December 22, 1944.

B. P. McNair Company,  
First Nat'l. Bank Bldg.,  
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

It is difficult to make a promise of a definite date that either Ken or myself can visit Great Falls in the very near future. There are so many plans being developed in various sections of the country, many of them in the works, that it seems hopeless to think of a trip to Great Falls for very soon.

We appreciate your invitation, and nothing would please either or both of us better than to spend a couple of days with you.

This inquiry I made of you about the corner store is from Ken and myself because we are very sold on Great Fall and the tremendous possibilities that present themselves for our company. We can see results possibly far exceeding the things that you and I talked about. We want to be in a position to take advantege of them and share the results with you folks.

## Defendant's Exhibit No. 16—(Continued)

As a preliminary step, could you give us your ideas of what might be worked out on this? When this has been received here, we will be in a position to develope it with our Merchandising Department. I don't want to bring it up for [211] discussion until I know what the answers are to the questions which will be asked.

Regarding the report on our sales for the quarter ending November 30th, this will be ready shortly. It takes almost thirty rays for the auditing report to go through the mill, and it is on our schedule for attention as soon as these figures are received by us. I am quite satisfied that when we get these figures, they will be pleasing both to yourselves and us.

Extending to you folks our very best wishes for a Happy Holiday Season.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ MIKE,

Real Estate Department.

MFHoben:bg [212]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North,  
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

January 15, 1945.

B. P. McNair Co.,  
1st Nat. Bank Bldg.,  
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

Total Net retail sales for the first three-quarters of our lease year with you, are \$179,357.63.

The full lease year will end February 28th at which time a complete report and remittance of additional rent due will be sent you.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,  
Real Estate Department.

BG:py

P. S. I have checked the lease and can find nothing in that certain lease between Ario and Western Auto requiring you to pay the charges on garbage and refuse assessment. We are writing to the Lease Dept. of Western Auto inquiring whether they have

Defendant's Exhibit No. 16—(Continued)  
been obligated to pay this in the past. As soon as  
we hear from them, the issue should be settled one  
way or the other.

BG [213]

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North,  
Minneapolis, Minn.

In Reply Please Refer to:

B. A. Green.

April 6, 1945.

B. P. McNair Co.,  
Great Falls, Montana.

Gentlemen:

We are pleased to make a report for the twelve month lease period ending February 28, 1945. Sales for the full period amounted to \$259,463.65.

We are sorry that the sales were not large enough to provide for additional rental. Presume that this is caused by the fact that the store did not occupy the enlarged quarters for the full twelve month period, having spent some time in the small store.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,  
Real Estate Department.

BAGreen:py

## Defendant's Exhibit No. 16—(Continued)

(Pencil notation)

259,463.65 total  
179,357.63 9 mos.

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80,106.02 Dec. Jan. Feb. [214]

C. S. McNair

W. Robt. Gilchrist, Manager  
B. P. McNair Company  
First National Bank Building  
Great Falls, Montana.

B. P. McNair

June 11, 1945.

Gamble-Skogmo, Inc.,  
700 Washington Avenue North,  
Minneapolis, Minnesota.

Attention: Mr. K. T. Watters.

Dear Ken:

Under date of April 6th, last, we received a report from Mr. B. A. Green of your office giving total sales for your first lease year in Great Falls, ending February 28th, last. When you were last in Great Falls we discussed briefly the matter of quarterly reports and you advised that the quarterly reports mentioned in the lease applied only to wholesale figures. I will agree the language might be confused so as to make it appear as you suggested. That, however, was not the intent at the time the lease was negotiated and concluded. It was the in-

## Defendant's Exhibit No. 16—(Continued)

tent of Mr. Hoben and ourselves that the quarterly sales report plus any overage earned was to apply to all sales, retail as well as wholesale. I am sure if you will ask Mr. Hoben about this point he will bear me out.

Since our second lease year began on March 1st, there is a report due on total sales for March, April and May, which we [215] will appreciate receiving at the earliest convenience of your Accounting Department. For purposes of comparison we would like also to have you send us sales for lease quarters for the period March 1st, 1944, through February 28th, 1945. Under date of January 15th, you gave us sales figures for the first three quarters but they were lumped in one figure. Please talk to Mike on this point and give it some attention.

With best regards from my brother and myself to all of you.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ CHET,

C. S. McNAIR.

ew/ [216]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North,  
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

July 2, 1945.

B. P. McNair Co.,  
1st Nat. Bank Bldg.,  
Great Falls, Montana.

Attention: C. S. McNair.

Dear Chet:

We are pleased to hand you herewith, report on the net retail sales for the first quarter of the new lease year beginning March 1, 1945. Retail sales for this three month period amounted to \$54,175.44.

We are also pleased to comply with your request of the 11th, asking for the retail sales by quarters for the lease year ending February 28, 1945:

1st quarter—March 1 thru May 31.....	\$ 11,394.29
2nd quarter—June 1 thru August 31.....	80,306.00
3rd quarter—Sept. 1 thru Nov. 30.....	87,657.34
4th quarter—Dec. 1 thru Feb. 28.....	80,106.02
Total For Lease Year Ending 2-28-45	\$259,463.65

Defendant's Exhibit No. 16—(Continued)

We trust that this covers the information asked for in your letter and are happy to send it to you.

Kind personal regards.

Yours truly,

GAMBLE- SKOGMO, INC.,

/s/ MIKE,

Real Estate Department.

MF Hoben :bg

(Pencil notation)

54,175.44

2%

---

108,350.88 earned

450

3 mos.

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1350.00 pd. [217]

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North,  
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

October 15, 1945.

McNair Reality Company,  
Great Falls, Montana.

Attention: Chet McNair.

Dear Mr. McNair:

We are pleased to hand you herewith report on

Defendant's Exhibit No. 16—(Continued)  
the net retail merchandise sales for the second quarter of the current lease year for our store in Great Falls.

Sales for this second quarter amounted to \$62,179.43, which makes a total of \$116,354.87 for the first six months' period of this lease year.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,

Secretary to Mr. Hoben.

(pencil note) June-July-Aug.

Entered 12-15-45. [218]

Gamble-Skogmo Inc.  
Operating Gamble Stores  
700 Washington Ave. North,  
Minneapolis, Minn.

In Reply Please Refer to:

M. F. Hoben.

December 17, 1945.

McNair Realty Co.,  
Great Falls, Montana.

Gentlemen:

According to our lease agreement with you, we are pleased to report to you the total net retail sales for the third quarter of this lease year—September,

Defendant's Exhibit No. 16—(Continued)

October and November—in our store in Great Falls.

Sales for this period amounted to \$67,579.81.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,

Secretary to Mr. Hoben.

Gamble-Skogmo Inc.  
Operating Gamble Stores  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

April 11, 1946.

McNair Realty Company,  
Great Falls, Montana.

Gentlemen:

We are pleased to hand you herewith, a report on the net retail sales for our store in Great Falls for the twelve month lease period ending February 28, 1946.

Net retail merchandise sales for this period amounted to \$254,359.05. The lease provides for a percentage on retail sales over \$270,000.00 per lease year.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo Inc.  
Operating Gamble Stores  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

July 9, 1946.

B. P. McNair Company,  
First National Bank Building,  
Great Falls, Montana.

Attention: Mr. Chet McNair.

Dear Chet:

We will try to answer several questions regarding net retail sales, etc. Net retail sales are gross retail sales less returned merchandise or repossessed merchandise sold on contract. Such merchandise, whether returned by the customer, or repossessed on contract is placed for resale purpose and again becomes a part of retail sales when made.

Regarding our percentage on general wholesale goods made on these premises, there has been none as we have been operating Great Falls on strictly retail activity. I wish it were possible to sit down across the desk and discuss the various questions you asked. It could be done much more satisfactory and complete.

With retail sales generally on the up-grade in the past year or so, I can understand your wonderment as to why Gamble sales have not followed the same pattern. One of the hardest hit from the standpoint of obtaining merchandise is our business. Our

## Defendant's Exhibit No. 16—(Continued)

buyers and merchandisers have done a marvelous job in [221] filling in the items lost during the war or greatly curtailed through the war and since. If I remember correctly, we lost over 1600 some items, a great many of which have not yet become available. This is especially true when we refer to such items as washers, refrigerators, radios, household appliances, furniture, and dozens of others. We have been greatly discouraged at times because of the slowness these items have returned to our stores. It is more difficult to buy furniture today than at any period since the war began. Washers have come through in a very feeble drizzle and refrigerators even less than that. Radios that were promised us in a sufficient volume—practically nothing has come through. I am not trying to weep on your shoulder but merely to make a correct statement of what has held our retail volume down. It would be much less than it is, if our buyers had not been able to acquire various other lines of merchandise to fill in. However, you will realize that we are restocking completely and remodeling our basement for sales use. Our figures on Great Falls are in the "red" probably much greater than you imagine, but we are not discouraged. We have now completed the remodeling of the basement, and we are remodeling and installing a new mezzanine floor, [222] and we also feel we are nearing the beginning of the period where all of the merchandise I mentioned will begin to flow in, and I hope it will be close to immediately. You will be happy with the returns you will receive from sales activity in these premises.

## Defendant's Exhibit No. 16—(Continued)

Our sales figures have lately picked up a little bit. For the first five months of 1946, they show 14.2% increase—not much to brag about but certainly headed in the right direction. Also, as of that date, we are more than \$5,000 in the "red." There is nothing wrong in our sales that can not be corrected immediatly upon receipt of ample and proper merchandise. I am very hopeful that this is close at hand.

I have had plans several times to visit Great Falls. I have looked forward to such a trip and a visit with you and your brother, Ben, whom I have never met. I still have this in mind, and I hope it will be possible before too long. In the meantime, please do not be too critical of all that has happened, because I will wager that the returns earned for you folks will be very pleasing to you in a short time and may make up for the lack of additional rental in this foregoing period.

When we have our grand opening for the remodeling and additional [223] stocking we have completed, I will estimate that our total sales for the first two (2) week period will be in the neighborhood, more or less, of \$100,000.00.

Regarding the lease on the lot and warehouse at the rear. The company has stood firm against a percentage arrangement on the lease. As originally mentioned, the rental was to be \$60.00 a month and we did not have any mention of the percentage sales that I was aware of. However, Chet, I do not wish to be arbitrary and I will recommend to the com-

Defendant's Exhibit No. 16—(Continued)  
pany a flat rental of \$75.00 a month, running concurrent to this main lease. If this meets with your and Ben's approval, I will prepare the lease and send it to you.

Phil Chandler expects to be in Great Falls next week, beginning by July 10, and intends to visit with you regarding the additional property you have in mind for our farm store use. I have discussed this with him and he has the information.

Kindest personal regards to you and your brother.

Sincerely yours,

GAMBLE-SKOGMO INC.,

/s/ MIKE F. HOBEN,

Real Estate Department.

MFHoben :do [224]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist. Manager

B. P. McNair Company

First National Bank Building,  
Great Falls, Montana.

July 12, 1946.

Mr. Mike F. Hoben, Real Estate Department.  
Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minnesota.

Dear Mike:

Your letter of July 9 explaining in such thorough detail the lack of volume in the Great Falls store is

Defendant's Exhibit No. 16—(Continued)  
at hand and thank you. I see the Irish have not lost their conversational ability even if it has to be reduced to writing. I might have been shorter if you had said that all available merchandise was being sent to Aberdeen and Havre rather than to Great Falls and the older stores. We hope, however, that someday we can stop being a step child and maybe the grand celebration on the new basement and balcony will do the trick. Will buy you a drink if it does and you can buy us one if it doesn't.

Thanks also for the explanation of "net retail sales." We understand the ordinary definition of "net" and "retail." The point involved was whether or not there were wholesale sales made on the premises and which were not credited to sales volume. Your letter assures us definitely that this is not the [225] case, but we still insist that our understanding is that had there been wholesale business from the premises those figures should have been included in the total sales volume.

In connection with the reporting of sales, may we call your attention to the fact that on June 10 a statemnt was due us of the sales volume had for March, April and May. It is now July 12 and we are still waiting. Please do what you can to apply a torch to Mr. B. E. Green. It is good to hear that sales are up 14% in the local store for 1946 but, while that is comforting in one way, it is depressing when compared to Gamble's 50% increase in sales nationally for the same period.

We have had a couple of long and pleasant visits

Defendant's Exhibit No. 16—(Continued)  
with Phil Chandler, who left this afternoon, and to whom we have mailed a memo of our conversations. He will go over the points involved, including a possible new building for farm sales on the vacant part of the property where you now utilize a small warehouse.

Best regards.

Very truly yours,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSM:SHP [226]

Gamble-Skogmo Inc.  
Operating Gamble Stores  
15 North Eighth Street  
Minneapolis 3, Minnesota.

July 26, 1946.

McNair Realty Co.,  
Great Falls, Mont.

Attention: C. S. McNair.

Gentlemen:

We are pleased to give you herewith, report on the net retail merchandise sales for the first quarter of the new lease year beginning March 1, 1946.

Net retail sales for this three month's period amount to \$73,018.20.

We are sorry that this report to you has been

Defendant's Exhibit No. 16—(Continued)  
 delayed for this length of time, but we have just  
 now received the sales figures.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

(Pencil Notations)

	73018
Quarterly guar. sales	67500
	<hr/>
	5518
“ Surplus sales @ 2%	.02
	<hr/>
	110.36 [227]
	<hr/>

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building,  
 Great Falls, Montana.

August 14, 1946.

Gamble-Skogmo Inc.,  
 15 North 8th Street,  
 Minneapolis 3, Minnesota.

Attention: B. A. Green,  
 Real Estate Department.

Dear Sirs:

This will acknowledge with thanks your letter of

Defendant's Exhibit No. 16—(Continued)

July 26, reporting sales for the first quarter of the new lease year beginning March 1, 1946, of \$73,-018.20.

Under these figures additional rent is due for the period in the sum of \$110.00. You overlooked sending check with your sales statement and we would appreciate a remittance in that amount.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

CSMcN :md

(Pencil notation): Lease calls for payment "on a quarterly accounting."

OK/H [228]

Gamble-Skogmo, Inc.  
Operating Gamble Stores  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

October 14, 1946.

McNair Realty Company,  
Great Falls, Montana.

Attention: Chet McNair.

Gentlemen:

We are very happy to enclose our check for \$1051.41 covering the accrued rental payment on our store in Great Falls from June 1st, 1946, through August 31st, 1946.

## Defendant's Exhibit No. 16—(Continued)

It is with a great deal of pleasure that we make this payment because we know that we had built up your hope of our being able to achieve these sales figures.

This does not represent any abnormal sales in that our grand opening is still ahead of us, and we know from past experience that there will be a great increase due to this.

Mr. Hoben joins me in sending kindest personal regards.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ P. C. FIKKAN,

Real Estate Department.

PCFikkан:p

Encl.-1 [229]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

B. P. McNair Company

First National Bank Building

Great Falls, Montana.

October 23, 1946.

Mr P. C. Fikkан,  
Real Estate Department,  
Gamble and Skogmo, Inc.,  
15 North 8th,  
Minneapolis, Minn.

Dear Sir:

Thank you for your letter of October 14th enclosing check in the amount of \$1051.41 for excess sales

Defendant's Exhibit No. 16—(Continued)  
for the three month period, June through October.  
We are very pleased that your store has gained  
some momentum and apparently is under way.

For our records, would you be kind enough to forward us the sales figures for this period and make a notation with your accounting department to do this in the future.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ B. P. McNAIR.

GPMcN :hc [230]

Gamble-Skogmo, Inc.  
Operating Gamble Stores  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

, November 1, 1946.

B. P. McNair Company,  
1st Nat'l. Bank Bldg.,  
Great Falls, Montana.

Gentlemen :

In compliance with the request in your letter of October 23rd, we are pleased to hand you herewith a report on sales by the month, beginning March 1st, 1946 and running through the end of August, 1946:

## Defendant's Exhibit No. 16—(Continued)

Month	Monthly Sales	(Notations)
March, 1946 .....	\$20,806.90	
April, 1946 .....	25,953.86	
May, 1946 .....	26,257.44	\$ 73,018.20
June, 1946 .....	30,259.74	
July, 1946.....	32,783.43	
August, 1946 .....	57,014.00	120,057.17
		<hr/>
		\$193,075.37

We hope that this recap gives you the information you request.

Yours very truly,

GAMBLE-SKOGMO, INC.,  
 /s/ B. A. GREEN,  
 Real Estate Department.

Gamble-Skogmo, Inc.  
 Operating Gamble Stores,  
 15 North Eighth Street,  
 Minneapolis 3, Minnesota.

January 20, 1947.

McNair Realty Company,  
 1st Nat'l. Bank Bldg.,  
 Great Falls, Montana.

Attention: B. P. McNair.

Dear Sirs:

We are pleased to advise that the last overage check sent you in the amount of \$1854.31 for the

Defendant's Exhibit No. 16—(Continued)  
period from September through November, 1946,  
was based on total net retail sales for the above-  
mentioned quarter of \$160,215.40.

The lease provides that we pay 2% on all sales  
over what would figure \$67,500.00 a quarter, which  
in this case would be on an overage of \$92,715.40.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department.

Gamble-Skogmo, Inc.  
Operating Gamble Stores  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

April 22, 1947.

Mr. Ben McNair,  
McNair Realty Company,  
Great Falls, Montana.

Dear Ben:

It seems that I am going to be delayed on my trip  
out in Montana so I am forwarding the check for  
the balance on our percentage agreement.

The total net retail sales for the period beginning  
March 1, 1946, to February 28, 1947, were \$567,-  
737.96. Eliminating the base of \$270,000.00 this  
gave an overage of \$297,737.96 on which we pay 2%  
or \$5,954.75. On August 19, 1946, we paid \$110.36

Defendant's Exhibit No. 16—(Continued)  
for the first quarter; on October 8, 1946, we paid \$1,051.14 for the second quarter; on January 8, 1947, we paid \$1,854.31 for the third quarter. This gives a total of \$3,015.81, which would leave a balance of \$2,938.35, the amount of which you will find our check enclosed.

Ben, we feel quite pleased to be able to pay you this amount and I am sure that you are much more satisfied with this kind of program. It can, and I think will be, even greater this year and in future years.

We hope that the program which you and I have discussed for further expansion in the way of farm store and such can be [233] developed if and when these building costs get to a point that is sensible for you to make the investment and for us to try to pay a rental on new construction.

With kindest personal regards.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ P. C. FIKKAN,

Real Estate Department.

PCFikkan:de

encl:1 [234]

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

July 14, 1947.

McNair Realty Company,  
Great Falls, Montana.

Gentlemen:

We are pleased to enclose herewith, our check in the amount of \$1,749.32, intended as the accrued rental payment earned through the operation of the percentage clause in your lease for the first quarter of the lease year running from March 1, 1947, through May 31, 1947.

Net retail merchandise sales for this period amounted to \$154,965.88. Your lease is based on 2% on all net retail sales over \$270,000.00 per lease year. Therefore, you are paid 2% on the overage, for the first quarter, of \$87,465.88.

We are pleased to send this additional rental check to you.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ MIKE HOBEN,  
Real Estate Department.

MFHoben:bg  
Encl. 1

Defendant's Exhibit No. 16—(Continued)  
(Pencil notation)

450

3

---

1350

154965.88

---

.02

---

309931.76 earned

1350 pd

---

1749.32 due & herewith. [235]

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

October 15, 1947.

McNair Realty Company,  
Great Falls, Mont.  
Gentlemen:

We are pleased to report herewith, sales made in your building in Great Falls, occupied by our retail store, for the second quarter of this lease year, running from June 1, 1947, to August 31, 1947.

Sales for this period amounted to \$135,563.46. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per year, or \$67,500.00 per quarter of a lease year. Therefore we pay you 2% on the overage of \$68,063.46.

We are enclosing our check in your favor in

Defendant's Exhibit No. 16—(Continued)  
(O.K.) the amount of \$1361.27 as payment for same.

We are sorry to note that there was a drop in sales for the second quarter of the lease year, but hope and trust that there will be a considerable rise in the last two quarters.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ MIKE F. HOBEN,  
Real Estate Department.

MFHoben:bg  
Encl.-1 [236]

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager  
B. P. McNair Company  
First National Bank Building,  
Great Falls, Montana.

October 20, 1947.

Mr. Mike F. Hoben,  
Real Estate Department,  
Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minn.

Dear Mike:

This will acknowledge, with thanks, yours of October 15th inclosing a very nice check for excess rental on your Great Falls store.

All Great Falls sales are a little off for the period covered by your report, so you need not feel too

Defendant's Exhibit No. 16—(Continued)  
badly especially in view of the fact you had a comfortable increase over the same period in 1946.

When your letter and check came in July covering March, April and May of this year I meant to write you a letter of thanks and congratulations. Just didn't get it done.

It looks now as though your Great Falls unit is really functioning and, of course, we are glad both for you and ourselves.

With kind personal regards and a *rembrance* to Ken Waters when you are in touch with him.

Yours sincerely,

B. P. MCNAIR COMPANY,

By /s/ C. S. MCNAIR.

CSMcN :hc [237]

P. S. My secretary has just reminded me of something that possibly ought to come to your attention. Ever since the lunch counter went in (incidentally, how would you like to rent some more lunch counters at 2% on the gross), there does not seem to be adequate ventilation at your store. Both customers and clerks have complained of this situation, we are simply passing it along as a good-will suggestion. Sometimes a very few dollars spent for ventilating fans can work wonders. I was going to take this up with Theis, but he got his nice promotion and left too fast. I am not, as yet, acquainted with the new man. Regards again.

/s/ CHET. [238]

## Defendant's Exhibit No. 16—(Continued)

C. S. McNair	B. P. McNair
W. Robt. Gilchrist, Manager	
B. P. McNair Company	
First National Bank Building,	
Great Falls, Montana.	

January 5, 1948.

Gamble-Skogmo, Inc.,  
700 Washington Ave. North,  
Minneapolis, Minnesota.

Attention: Mr. Mike F. Hoben,  
Real Estate Department.

Dear Mike:

In December we should have received sales report for the quarter, September, October and November, 1947.

This report has not shown up as yet and we would appreciate having it within the next few days so as to include it in our 1947 figures, where it belongs.

With the hope you had a splendid Christmas and will have a wonderful New Year, we are,

Yours sincerely,

B. P. McNAIR COMPANY,

By /s/ CHET,

C. S. McNAIR.

CSMcN :hc [239]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

January 7, 1948.

B. P. McNair Company,  
First National Bank Bldg.,  
Great Falls, Montana.

Attention: C. S. McNair.

Dear Sir:

There has been a little delay in the audit as of December 1st. Therefore, a statement and check for additional rental will go forward as soon as Mr. Hoben returns to the office, which will be within a week.

Mr. Hoben has been confined to his home through illness since November 30th.

Yours truly,

GAMBLE-SKOGMO, INC.,

/s/ B. A. GREEN,

Real Estate Department,  
Secretary to Mr. Hoben.

Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

January 21, 1948.

McNair Realty Co.,  
Great Falls, Mont.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the third quarter of this lease year, running from September 1, 1947, to November 30, 1947.

Sales for this period amounted to \$142,227.38. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,500.00 per quarter of a lease year. Therefore we pay you 2% on the overage of \$74,727.38.

We are happy to enclose our check in your favor in the amount of \$1494.55 in payment of same.

Kind personal regards and Best Wishes for the New Year.

Yours very truly,

GAMBLE-SKOGMO, INC.,  
/s/ B. A. GREEN,  
Real Estate Department.

## Defendant's Exhibit No. 16—(Continued)

## (Notations)

142227.38

67500

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74727.38

2

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149454.76

Encl.-1 [241]

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

March 31, 1948.

McNair Realty Co.,  
Great Falls, Mont.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the fourth and final quarter of the lease year, running from December 1, 1947, to February 29, 1948.

Sales for this period amounted to \$155,553.18. Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,500.00 per quarter. Therefore, we pay you 2% on the overage of \$88,053.18 for this fourth quarter.

Defendant's Exhibit No. 16—(Continued)

We are happy to enclose our check in your favor  
in the amount of \$1761.06 in payment of same.

Yours very truly,

GAMBLE-SKOGMO, INC.,

/s/ M. F. HOBEN,

Real Estate Department.

(Pencil notations)

155,553.18

67,5

---

88,053.18

2

---

176,106.36

(Attached adding machine tape)

Sales	154,965.88
	135,563.46
	142,227.38
	155,553.18

---

588,309.90

Rent	1,749.34
	1,361.27
	1,494.55
	1,761.06
	5,600.00

---

11,966.20

MFHoben:bg

Encl.-1 [242]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota  
Main 0281

July 6, 1948

(Pencil notation)

Unit #1. General store .....	165,455.31
#2. Lunch counter .....	9,258.35
#5. Farm .....	64,398.63
<hr/>	
	239,112.29

McNair Realty Company  
Great Falls, Montana

Gentlemen:

We are pleased to enclose herewith a report on the net retail sales for the first quarter of the new lease year beginning March 1, 1948, together with our check in payment of the additional rental earned for you through the operation of the percentage clause.

Net retail merchandise sales for the three month period from March 1, 1948, through May 31, 1948, amounted to \$77,122.98. Our lease provides that we pay you 2% on net retail sales over \$270,000, or \$67,500 per quarter. Therefore the attached check in the amount of \$192.46 is based on the overage for the quarter of \$9,622.98.

Defendant's Exhibit No. 16—(Continued)

We are happy to be able to send this additional  
rental to you.

Yours very truly,

/s/ WM. T. HILL,

Real Estate Department.

WTH:bg

Encl. 1

(Notations)

77,122.98	450	(4384 Dale Cockayne
<u>2</u>	<u>3</u>	
154,245.96	1350	
<u>1,350.</u>		

192.46	Farm #5	Unit 2	Fountain Lunch
	36,042.07	3,004.15	
	13,009.27	3,310.50	Apr. 53,819.21)
	<u>15,347.29</u>	<u>2,943.70</u>	Mar. 54,229.87) Unit 1
	64,398.63	9.258.35	<u>May 57,406.23)</u>
			165,455.31

These figures furnished by Cockayne).

B. P. McNair Company,  
Great Falls, Montana.

C. S. McNair

B. P. McNair, Jr.

July 8, 1948.

Gamble-Skogmo, Inc.,  
700 Washington Ave.,  
Minneapolis, Minn.

Attention: Mr. Wm. T. Hill,  
Real Estate Department.

Dear Mr. Hill:

Thank you for your letter of July 6th enclosing  
Check, \$192.46.

## Defendant's Exhibit No. 16—(Continued)

The total sales figures for March, April and May, \$77,122.98, struck us as being somewhat low for the quarter. We thereupon called Mr. Dale Cockayne, Manager here to ask him if there could be an error. He says there undoubtedly is.

We are, therefore, returning your check herewith and will ask you to review the sales figures for Great Falls for the months of March, April and May.

While the lease does not make it incumbent upon you to furnish figures for each month separately, we would appreciate having them in that way if you have no objection.

With sincere regards to yourself and Mike Hoben, we are

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN :hc

encl. [244]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

July 12, 1948.

B. P. McNair Company,  
Great Falls, Montana.

Attention: Chet McNair.

Dear Chet:

It is certainly embarrassing to have made such an error in percentage report and check, but our figures come from the Accounting Department for this purpose. I should have noticed the differential immediately before sending you the record.

The following is the correct monthly statement which I am sure is much more satisfactory.

Sales:

March .....	\$ 54,004.97
April .....	41,328.93
May .....	58,632.06

Total .....	\$153,965.96
Minimum .....	67,500.00

Overage .....	\$ 86,465.96
	.02

Pay .....	\$ 1,729.32
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I, too, would have been very surprised to receive a small check such as you did. I hope that you will

Defendant's Exhibit No. 16—(Continued)  
take my name off the blackboard now that we have  
corrected it.

With kindest personal regards to you and Ben.

Yours very truly,

/s/ BILL,

WM. T. HILL,

Real Estate Department.

WTH:ms [245]

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

July 17, 1948.

Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minn.

Attention: Mr. Wm. T. Hill.

Dear Bill:

We have your letter of July 12th with the corrected sales figure for March, April and May on the Great Falls store and enclosing check, \$1,729.32

I think these figures will bear still another reviewing. You report total sales for the period of \$153,965.96. For the same period last year you reported \$154,965.88.

We are at a loss to understand how the sales can be less this year than last, when we have had consistently glowing verbal reports from different

Defendant's Exhibit No. 16—(Continued)

Gamble men as to the large increase being made under the new Manager.

It could be that you have not included farm sales. In that event, they should be added to your total for while the lease does not mention farm sales specifically, there never was any misunderstanding as to the fact that all sales, except to employees, and even including Mail Order which might originate in the City of Great Falls, or at any other location here were to be included in the computation of volume.

Wholesale sales, if any, were to be reported specifically and figured on a 1% basis. [246]

These points were carefully covered between Mr. Hoben and ourselves and I am sure Mike will recall the circumstances. We even kidded about the Landlord being eligible for employee's discounts and Mike said we will write that in the lease too.

Please check the whole picture again, Bill, and let us have your considered advices.

With regards to both yourself and Mike,

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR.

CSMcN :hc [247]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

August 3, 1948.

Mr. Chet McNair,  
B. P. McNair Company,  
Great Falls, Montana.

Dear Mr. McNair:

Please find enclosed your check for additional rental in the amount of \$309.76. We delayed in sending this final report to you until the accountant returned from his vacation that generally handles this account.

He has spent several days getting the correct figures together. Needless to say, we are much chagrined because of the previous report.

However, this is positively right and certainly hope that you will forgive us for these errors.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

WTH:ms

Encl.-1 [248]

Defendant's Exhibit No. 16—(Continued)

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

August 7, 1948.

Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minnesota

Attention: Mr. William T. Hill.

Dear Mr. Hill:

We are today in receipt of your letter August 3rd enclosing additional excess rent check of \$309.76 to cover the period of March, April and May, 1948.

This is the third check in connection with this report and the matter is still unsatisfactory. This time you have failed to send us a signed statement of sales or to show how this second additional amount is arrived at.

We will expect a full and complete accounting for the period and hereafter would appreciate such statements by the 15th of the month following the closing of each quarterly period. The present settlement is approximately sixty days late.

Yours very truly,

B. P. McNair Company,

By /s/ C. S. McNAIR,

C. S. McNAIR.

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

August 30, 1948.

B. P. McNair Company,  
Great Falls, Montana.

Gentlemen:

Following is a complete report on our net retail merchandise sales made during the months of March, April and May, 1948, at our store in Great Falls, Montana:

Sales for March ..... \$ 55,081.49

(Notation)

Sales for April ..... 55,210.18

figure used

Sales for May ..... 59,162.34

---

\$169,454.01

Payment based on 2% on the overage of \$101,954.01, makes your additional earning for the period amount to \$2039.08.

One check in the amount of \$1729.32 was forwarded to you on July 12th and another check for the balance was forwarded to you on August 3rd.

We trust this report will meet with your satisfaction.

Yours very truly,

/s/ B. R. GUSTAFSON,  
Chief Accountant.

## Defendant's Exhibit No. 16—(Continued)

(Notation)

450

3

---

1350

169454.01

.02

---

3389.0802

---

1350.

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2039.08 [250]

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 1, 1948.

Gamble-Skogmo Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minnesota.  
Real Estate Department.

Dear Sirs:

Please refer to our letter of August 7th addressed to the attention of Mr. William T. Hill. We have had no reply to this letter.

May we ask you to furnish us with a complete report of your Great Falls sales for the lease period covering March, April and May?

Defendant's Exhibit No. 16—(Continued)

We would also appreciate receiving, not later than September 15th, a sales report and accounting for the lease quarter covering June, July and August.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN :hc

(Pencil note)

August sales are not available before Sept. 25 at the earliest.

B. G. [251]

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

September 2, 1948.

B. P. McNair Company,  
Real Estate,  
Great Falls, Montana.

Attention: C. S. McNair.

Dear Mr. McNair:

You no doubt have received the accountant's computation in writing by this time for the sales covering March, April and May.

Just as soon as the August sales are available we

Defendant's Exhibit No. 16—(Continued)  
will give you a definite report for June, July and  
August as requested. It will be around the 25th of  
September before these are available.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

WTH:ms [252]

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 4, 1948.

Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minn.  
Real Estate Department.

Attention: Mr. Wm. T. Hill.

Dear Mr. Hill:

We have Mr. Gustafson's report of sales covering  
March, April and May.

It is evident that he did not include any so-called  
farm sales figures in this computation.

In my letter of July 17th I touched on that point  
but you have disregarded it in your several letters

Defendant's Exhibit No. 16—(Continued)  
and we would like to have you clarify it from your  
viewpoint.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN :hc

(Notation)

\$2039.08 [253]

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

September 20, 1948.

Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minn.  
Real Estate Department.

Attention: Mr. Wm. T. Hill.

Dear Mr. Hill:

This is to call your attention to the fact that we have not received any sales report on your Great Falls store for the period covering June, July and August.

Also, we have had no reply to our letter of September 4th inquiring as to farm sale figures for the previous period covering March, April and May.

Defendant's Exhibit No. 16—(Continued)

May we ask that you give both of these matters  
your attention.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR.

CSMcN :hc [254]

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis, Minnesota

B. P. McNair Co.  
Great Falls, Mont.

September 27, 1948.

Attention: C. S. McNair.

Dear Chet:

Your letters of September 4th and 20th addressed to Mr. Hill come to my attention.

I am a little bit confused regarding your request for an accounting of farm machinery sales made on other premises than those leased from you by us. Our lease with you folks on the West half of Lot Eight (8) and on Lot Nine (9), Block Three Hundred Sixteen (316), Town or Townsite of Great Falls, Montana, is the only lease with you requiring settlement on retail sales made. All of our reports and payments cover only sales made on these de-

Defendant's Exhibit No. 16—(Continued)  
scribed premises. No reports on the sale of merchandise, farm machinery, etc., is made on other property rented from you or on property rented from others in Great Falls.

We are satisfied that if you will examine your existing lease, Paragraph Two, it will state this very clearly. I would mention that at the time you and I negotiated this original lease, no mention or discussion of sales of farm machinery was had because at that time, our company had no thought of engaging in farm machinery business. Our company's handling of farm machinery came about at a much later date.

We trust that this will clarify the matter to [255] your satisfaction as well as ours.

Kind personal regards.

Sincerely yours,

/s/ MIKE F. HOBEN,

M. F. HOBEN,

Real Estate Department.

MFH:bg

cc: Dale Cockayne, #1282-1.

Jim McNaught, Dist. Mgr.

Phil Fikkan, Regional Mgr. [256]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

B. P. McNair Co.  
Great Falls, Mont.

Ocotober 18, 1948.  
Dictated 10-15-48.

Attention: Mr. Chet McNair.

Dear Chet.

I have purposely held up answering your letter of September 29th until I could dig up additional information on the complaint you made.

First of all, Mrs. Green tells me that there was an error first by her in compiling the July 6th report; then on the second complaint, she investigated and found an additional error in the Accounting Department's figures, etc. All of this is very distressing, and I was sorry to learn of it, but we all have to recognize that to err is human and that even our company, with its earnest effort, cannot escape an occasional happening such as you complain of, and I think you had just cause for complaint.

I offer my apology for myself and our company for any inconvenience and disturbance it might have caused you and Brother Ben. I do not know just when I can be in Great Falls. I am still receiving treatment at Rochester, and this will continue for some time, but as you are an occasional visitor to Minneapolis, I would welcome an opportunity to discuss the subject matter with you.

## Defendant's Exhibit No. 16—(Continued)

We are also happy to enclose our check in the amount of \$1749.61 as the accrued rental earned for the second quarter [257] of June, July and August, together with the statement on sales as follows:

June .....	\$ 51,382.00	
July .....	51,559.36	(Notation)
August .....	52,039.04	over
<hr/>		
Total .....	\$154,980.40	

I trust this finds you and your brother enjoying good health, and I want you to feel free to write to me at any time either with complaint or praise, whichever the situation warrants. I assure you it will have my immediate and prompt attention.

Sincerely yours,

/s/ M. F. HOBEN,

M. F. HOBEN,

Real Estate Department.

MFH:bg

(reverse aide)

154,980.40	450	
2	3	
<hr/>	<hr/>	
3,099.6080	1350	
1350		
<hr/>	<hr/>	
1,749.60	[258]	

Defendant's Exhibit No. 16—(Continued)

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

October 28, 1948.

(Pencil notation—B. Berghuis to answer)

Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minn.

Attention: Mr. M. F. Hoben,  
Real Estate Dept.

Dear Mike:

We are sorry to hear of your continued illness and hope that it will be short duration.

This will acknowledge your letter of October 18th in regard to our Great Falls lease and containing what purports to be a sales report for the Quarter ending August 31st, 1948.

This report is unsatisfactory, first, for the reason that it is a matter of some six weeks late and, second, for the reason that for a sales report it certifies nothing.

Your letter also purports to answer our letter of September 29th but fails to make any mention of the point raised in the fifth paragraph as regards unreported farm sales for the quarter ending May 30th, 1948.

In view of your own illness and the continued unsatisfactory replies which we get when we get any

Defendant's Exhibit No. 16—(Continued)  
replies from your Real Estate Department, we  
regret that it becomes necessary to take the matter  
up with some other department of your Company  
and accordingly [259] are today addressing Mr. P.  
W. Skogmo whose name appears on our lease.

Yours very truly,

McNAIR REALTY COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR,

Pres.

CSMcN :hc

cc. Mr. P. W. Skogmo, Pres. [260]

B. P. McNair Company  
Great Falls, Montana

C. S. McNair

B. P. McNair, Jr.

October 28, 1948.

(Pencil notation: Bill Hill's handling.)

Mr. P. W. Skogmo, President,  
Gamble-Skogmo, Inc.,  
15 North 8th Street,  
Minneapolis 3, Minnesota.

Dear Sir:

The attached copy of a letter written today to  
Mr. Hoben is self-explanatory insofar as it goes.

We address you with the request that you review  
the entire file in connection with this lease, either

Defendant's Exhibit No. 16—(Continued)  
yourself, or, if that is impracticable, that you have it reviewed by someone who is not connected with the Real Estate Department.

After such review we would appreciate hearing from you at your convenience and with any comments you care to make.

We have been reluctant about going over the head of the Real Estate Department but matters have been handled so unsatisfactorily for the past four years that we are left with no alternative.

In the event that your file is not available or should appear incomplete, we can send you a copy of ours.

Yours very truly,

McNAIR REALTY COMPANY,  
By /s/ C. S. McNAIR,  
C. S. McNAIR,  
Pres.

CSMcN :hc  
encl. [261]

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

November 5, 1948.

Mr. C. S. McNair, President,  
B. P. McNair Company,  
Great Falls, Montana.

Dear Mr. McNair:

Mr. P. W. Skogmo, President of our Company, has handed me your letter of October 28 in connec-

Defendant's Exhibit No. 16—(Continued)  
tion with our lease with you covering the store  
building at Great Falls.

Mr. M. F. Hoben, Head of our Real Estate Department, with whom you previously corresponded, is in the hospital at Rochester, Minnesota. Mike has had a very rough time of it this year, in that last spring he was at Rochester for several months at which time the surgeons amputated his left leg above the knee and he was just endeavoring to learn how to use an artificial limb, when he had to go back to Rochester where the surgeons have now amputated his right leg just below the knee. As a result, he will have to remain in Rochester for at least several weeks more and all of this has left his department very short-handed but the remaining folks have done an outstanding job, we feel, in attempting to keep up with the work. Mike, of course, has always been a glutton for work and with him out of the office for months on end this year the other folks have just had to take over his work with the result that they sometimes necessarily fall a little behind with the work. I mention this because I have discussed with Mr. Walter Dreves, our Controller, the matter of getting [262] quarterly sales statements and quarterly percentage rent checks to you a little quicker. Mr. Dreves tells me that the quarterly statements of the Great Falls as well as other stores is usually compiled on or about the 20th day of the month following the close of the quarter and that being true, in the future, I see no reason why the quarterly statements can't be in

## Defendant's Exhibit No. 16—(Continued)

your hands at least within thirty (30) days after the close of each quarter. I am sending copy of this letter to the Lease Department and am sure that in the future they will do their utmost to endeavor to get you the quarterly statement and your percentage rent check within thirty days after the end of each quarter. In the absence of Mr. Hoben, I have reviewed the entire file with Mr. William Hill of the Real Estate Department. First of all, I find that an unfortunate error was made in sending you the sales figures for the quarter consisting of March, April and May this year. Like all other big companies we are not immune to errors but in the final analysis it has worked out, I find, to your advantage at our expense. The sales for that quarter as reported to you and upon which we calculated the 2% rent amounted to \$169,454.01. Our lease with you, paragraph 2, provides "No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores." The sales figure of \$169,454.01 for the spring quarter included \$6,499.95 of sales at wholesale to employees and within the language of the lease you will see [263] that those figures should have been excluded. However, they were included with the result that we overpaid you \$129.99 (2% of \$6,499.95), for that quarter. We reported sales to you for the quarter ending August 31 in the amount of \$154,980.40 which amount includes \$5682.65 of sales at wholesale to employees and this again, within the terms of the lease, should have been excluded. However

Defendant's Exhibit No. 16—(Continued)  
by including those sales, as was done, we overpaid  
you \$113.65 rent for that quarter. In other words,  
we overpaid our rent for the six months period  
ending August 31st, by \$243.64, so that while you  
may have become irked by the error that was made  
in reporting the sales to you with some delay, you  
can see from the foregoing figures that you have not  
by any means been hurt in the collection of rents.

I hope that the foregoing explanation clears up  
this entire matter to your satisfaction. The Com-  
pany regrets, of course, that there should be any  
misunderstanding with any landlord over any mat-  
ter and particularly with you folks for everyone in  
our Lease Department feels that you have been  
exceptionally fine landlords in the many years that  
we have had the pleasure of doing business with  
you and we hope to continue our relations on that  
friendly basis.

Yours very truly,

/s/ W. P. BERGHUIS,  
General Counsel.

WPBerghuis:hb [264]

## Defendant's Exhibit No. 16—(Continued)

,      Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

November 15, 1948.

Mr. C. S. McNair, President,  
B. P. McNair Company,  
Great Falls, Montana.

Dear Mr. McNair:

I have your further letter of November 9 with reference to our lease.

While our lease with you does not provide for the furnishing certified reports of sales, we have no objection to doing so and I am accordingly enclosing sales figures for the two quarters which you requested, all certified by Mr. Walter J. Dreves, Controller of our Company.

I have had nothing to do in the past with the payment of rents on this or other property and accordingly I did not know just what procedure was followed in reporting quarterly sales. I find that the Lease Department people took off the sales from the store statement but, of course, the people in the Lease Department are none of them accountants, and with that type of procedure it was not unlikely that some errors would occur. Hereafter the quarterly figures will be certified to the Lease Department by either the Controller or his assistant, who are experienced accountants, of course, and through that procedure in the future we hope to minimize any errors such as have occurred in your

Defendant's Exhibit No. 16—(Continued)  
case. From the certified figures as now enclosed you will observe that we have overpaid your rent and in line with your letter of November 9 we should be glad to [265] receive your refund check for the amount of the overpayment.

The figures included in the certified report herewith enclosed do not include farm sales for such farm sales do not come under the terms of your lease and are not subject to the percentage clause. As you know, we sell farm machinery from two other locations in Great Falls, one of which other locations we rent from you but that lease contains no percentage clause and the other location we rent from other parties. The farm store is entirely a separate unit, it carries its own inventory, none of which is located on your store property which we are corresponding about and, therefore, such sales do not constitute sales on the leased premises covered by our store building lease and for that reason there is no point in reporting the sales of the farm store to you.

Yours very truly,

/s/ W. P. BERGHUIS,  
General Counsel.

WPBerghuis:hb

Encl. [266]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

December 30, 1948.

B. P. McNair Company,  
Great Falls, Montana.

Attention: C. S. McNair.

Gentlemen:

We are pleased to report herewith on the sales made in your building in Great Falls, occupied by our retail store, for the third quarter of the lease year, running from September 1, 1948, to November 30, 1948.

September .....	\$ 60,897.59
October .....	71,417.61
November .....	78,288.41
<hr/>	
	\$210,603.61

Our lease provides that we pay you 2% on all net retail sales over \$270,000.00 per lease year, or \$67,-500.00 per quarter. Therefore, we pay you 2% on the overage of \$143,103.61 for this third quarter.

We are happy to enclose our check in your favor in the amount of \$2,862.07 in payment of same.

Yours very truly,

/s/ WM. T. HILL,

WM. T. HILL,

Real Estate Department.

## Defendant's Exhibit No. 16—(Continued)

(Pencil notations)

210,603.61

.02

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4212.0722

1350.

---

2862.07

450

12

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2/5400

---

2700.00

This check cashed but no acknowledgment made.

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

March 25, 1949.

In Reply Please Refer to:

W. T. Hill.

McNair Realty Co.,  
Great Falls, Mont.

Attention: Mr. Chet McNair.

Dear Mr. McNair:

We are pleased to give you herewith a report on the net retail merchandise sales obtained in your premises at 521-3-5 Central Avenue, Great Falls,

## Defendant's Exhibit No. 16—(Continued)

which our store occupies, as handed to us by our Accounting Department for the period from December 1, 1948, through February 28, 1949:

December, 1948 .....	\$ 98,830.24
January, 1949 .....	37,190.65
February, 1949 .....	32,343.86
<hr/>	
Total .....	\$168,364.75

Figured on a quarterly basis, we are to pay to you 2% on net retail merchandise sales over \$67,500 per quarter. Therefore, for the above-mentioned period, we pay you 2% on the overage of \$100864.75. Our check in the amount of \$2,017.30 is enclosed herewith.

We are happy to be able to send this check to you.

Yours very truly,

/s/ WM. T. HILL,

WILLIAM T. HILL,  
Real Estate Department.

WTH:bg

(notation)

168364.75

2

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336729.50

1350

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2017.30 [268]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

In Reply Please Refer to:

April 6, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

December, 1948.....	\$ 98,830.24
January, 1949 .....	37,190.65
February, 1949 .....	32,343.86

---

Total .....	\$168,364.75
Less Exempted Sales .....	67,500.00

---

Base Sales .....	\$100,864.75
Rental Rate .....	2%
Rental Payment .....	2,017.30

/s/ WALTER J. DREVES,

WALTER J. DREVES,  
Controller. [269]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

April 6, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana.

September, 1948 .....	\$ 60,897.59
October, 1948 .....	71,417.61
November, 1948 .....	78,288.41
<hr/>	
Total .....	\$210,603.61
Less Exempted Sales .....	67,500.00
<hr/>	
Base Sales .....	\$143,103.61
Rental Rate .....	2%
Rental Payment.....	\$ 2,862.07

/s/ WALTER J. DREVES,

WALTER J. DREVES,  
Controller [270]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
15 North Eighth Street  
Minneapolis 3, Minnesota

June 29, 1949.

In Reply Please Refer to:

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

March, 1949 .....	\$ 48,463.13
April, 1949 .....	53,117.37
May, 1949 .....	53,648.45
<hr/>	
Total .....	\$155,228.95
Less Exempted Sales .....	67,500.00
<hr/>	
Base Sales .....	\$ 87,728.95
Rental .....	2%
Rental Payment .....	\$ 1,754.58

/s/ WALTER J. DREVES,  
WALTER J. DREVES,  
Controller. [271]

## Defendant's Exhibit No. 16—(Continued)

Gamble-Skogmo, Inc.  
Operating Gamble Stores  
15 North Eighth Street  
Minneapolis 3, Minnesota

October 4, 1949.

I, hereby certify that the amounts set forth below constitute the net sales under the terms of a lease agreement dated December 27, 1943, for the purpose of computing rentals due B. P. McNair Company for premises at 521-3-5 Central Avenue, Great Falls, Montana:

(1949) June .....	\$ 49,302.49
July .....	47,718.45
August .....	47,446.04
<hr/>	
Total .....	\$144,466.98
Less Exempted Sales .....	67,500.00
<hr/>	
Base Sales .....	\$ 76,966.98
Rental Rate .....	2%
Rental Payment .....	\$ 1,539.34

/s/ WALTER J. DREVES,

WALTER J. DREVES,  
Controller. [272]

## CHESTER McNAIR

resumed the stand and testified as follows:

Direct Examination  
(Continued)

By Mr. Hall:

Q. The complaints that were made by you with reference to accountings and with reference to the amounts of checks remitted by the Gamble-Skogmo Company were in writing, were they not, Mr. McNair? A. Yes.

Q. I notice that some of the correspondence is on the letterhead of B. P. McNair Company or signed B. P. McNair Company, was that covering accounting as agent for the McNair Realty Company in that correspondence? A. Yes.

Q. Was there ever any accounting made on wholesale sales?

A. Never any accounting made on wholesale sales.

Q. And so far as you know then were you ever paid any percentage based upon wholesale sales during the entire period December 27th—of the December 27th lease?

A. Not that I am aware of.

Q. Was there ever any accounting made of the Gamble-Skogmo Company up to the year 1948 of total sales?

A. There were letters advising our total sales and such and such.

Q. Was that total sales or net retail sales?

(Testimony of Chester McNair.)

A. I believe there are letters showing net retail sales. [273]

Q. At any rate that shows in these letters?

A. That shows in this correspondence.

Q. In any event wholesale sales were eliminated entirely from any account?

A. So far as I know.

Q. So far as you know? A. Yes.

Q. Now the only information you have with reference to sales being made at any given time by the stores in Great Falls was by correspondence?

A. All written reports are received in that correspondence.

Q. Well, did you receive any other information with reference to sales being made? A. I did.

Q. And from whom?

A. In conversation with Mr. Cockayne in June or July of 1948 I was told by him that the sales for the current period could very considerably exceed the sales for the preceding quarter; and, of course, I was pleased at that and so was he. And he told me the sales, told me verbally what the sales for the last concluded quarter shows upon which we had no written report. He gave me those figures verbally at that time.

Q. And did the accounts which you received thereafter from the headquarters from Gamble-Skogmo vary considerably from the figures Mr. Cockayne gave you?

A. May I refer to my notes? [274]

(Testimony of Chester McNair.)

Q. I don't want to go into any figures. Did they vary considerably? A. The written reports?

Q. Yes, from the Minneapolis headquarters?

A. The first report was approximately one-fourth of the total amount as reported by Mr. Cockayne.

Q. And was it then you made complaint to the Minneapolis headquarters of Gamble-Skogmo with reference to the amount of the check you had received and the accounting that had been made?

A. Yes, I asked him to review their files. I said apparently there is some error here.

Q. And that was in the year 1948, was it not?

A. Yes.

Q. And that correspondence all appears, does it not, in the file which has been introduced in evidence as Defendant's Exhibit 16?

A. I presume so. I haven't examined that file but I judge it would.

Q. And finally after three or four attempts you finally achieved a result approximating the figure given you by Mr. Cockayne some time before?

A. No, there were several exchanges of letters, each time a protest on our part. We received three different checks covering the quarter ending May 31st, 1948. Three different checks, each time saying there has been a mistake made and we give you an additional check, and each time the [275] assurance that this time it is correct. And when we finally, in September, got a certified accounting the end of September covering the period ending in May it

(Testimony of Chester McNair.)

still was materially different from Mr. Cockayne's figures.

Q. So that you never did arrive at the identical figure?

A. We never arrived at a figure acceptable to us.

Q. Now going back to the time that you were negotiating the lease of December 27, 1943, with Mr. Hoben you finally arrived at a lease which was based upon a minimum rental of \$5400.00 a year or \$450.00 a month? A. Yes.

Q. With a percentage based on net retail sales over and above \$270,000.00 per year?

A. That is correct.

\* \* \*

Q. Let me get at it this way, then, Mr. McNair. When the store started out was there a lunch counter in there? [276] A. No.

Q. And had you mentioned a lunch counter so far as this Mr. Hoben was concerned?

A. No.

Q. Was there any question but what the lunch counter was to pay 2% on net retail sales?

A. No discussion.

Q. Was there any discussion between you and Mr. Hoben with reference to farm sales?

A. No discussion. [277]

\* \* \*

Q. And to bring the matter out there was no discussion of any lunch counter or luncheonette as such?

(Testimony of Chester McNair.)

A. There was no discussion of lunch counter or luncheonette. [278]

\* \* \*

Q. What have you to say with reference to the desirability of the location at 521, from the standpoint of mercantile establishment that location at 521, 523, 525 Central Avenue?

A. I believe it is one of the most desirable locations in the city retail locations.

Q. Would that be your view of the matter as an experienced real estate man in the city of Great Falls? A. Yes.

Q. What have you to say about the minimum rental of \$450.00 a month, is that a reasonable rental considering the location and the size of the building?

A. Do you mean a reasonable flat rental?

Q. Yes.

A. No, it is not. It is far underneath, far under the value then or now as a rental.

Q. And would that rental pay you any return upon your investment? A. None.

Q. As a flat rental? A. No.

Q. About what are the taxes upon the property combined in the Gamble-Skogmo setup?

A. I believe the property taxes this past year were \$5200.00. [279]

Q. Does that include additional property other than Gamble-Skogmo? A. Yes.

Q. That includes also part of the building occupied by Duval-Wallace Hardware? A. Yes.

Q. And part occupied by Leslie's, does it not?

(Testimony of Chester McNair.)

A. Yes.

Q. And in addition to your original investment have you been compelled during the occupancy of the building by Gamble-Skogmo to put additional money by way of repairs in the building?

A. We have put two kinds of money into the—this premises you mean?

Q. Yes.

A. We have put two kinds of money into their premises, one would be normal repairs and one would be remodeling for their special purpose.

Q. Remodeling for the special purpose of Gamble-Skogmo? A. Yes.

Q. Do you recall now approximately the amount of money you had in your remodeling account, that is, that you have paid out for the benefit of Gamble-Skogmo? A. Yes, upwards of \$10,000.00.

Q. And so far as repairs are concerned can you give the amount you have expended during the occupancy of the building by Gamble-Skogmo? [280]

A. Yes, upwards of \$3,000.00.

Q. And does that include repairs in connection with the roof? A. Yes.

Q. And what have you to say whether or not a new roof has been placed on the building now occupied by Gamble-Skogmo?

A. A new roof was put on the building since their occupancy.

Q. Now when did you first discover, Mr. McNair, the fact that farm sales were not being in-

(Testimony of Chester McNair.)

cluded in the accounts or in the letters giving you the net retail sales?

A. Well I was surprised to learn they were not included during the summer of 1948.

Q. And how did you ascertain that fact that they were not being included?

A. I learned it because of the discrepancies in the figures quoted to us by Mr. Cockayne and in the figures representing sales quoted to us by the Minneapolis office.

Q. And did you and Mr. Cockayne in any conversation arrive at the conclusion that that must be the cause of the discrepancy?

A. I don't believe we ever discussed it as between ourselves.

Q. But you arrived at that conclusion by reason of the difference between the figures furnished by him and the figures furnished by the Minneapolis office? [281]

A. I arrived at it by comparison of the figures furnished by him and by the Minneapolis office.

Q. Yes. A. It was evident.

Q. And that occurred in 1948? A. Yes.

Q. And did you immediately make a protest?

A. Immediately.

Q. And those protests are included in Defendant's Exhibit No. 16? A. That is correct.

Q. And their response is there too?

A. That is correct.

Q. Were you ever furnished at any time with

(Testimony of Chester McNair.)

a statement of the amount of sales from the farm department?

A. Never. You mean from Minneapolis?

Q. Yes. A. No written statement ever.

Q. Did Mr. Cockayne ever furnish you with any such figures?

A. Yes, he gave me some figures orally.

Q. Did you talk with him in the business office at Gambles? A. Yes.

Q. And did he get it from the store reports such as we have here in court?

A. Yes, he got them from, I presume, that same book, one like it.

Q. And as a result of that protest were you ever furnished [282] by the Minneapolis office with any figures showing the farm sales?

A. Never. [283]

\* \* \*

Q. Now after you found out, Mr. McNair, with reference to the elimination of farm sales from the accountings made by Gamble-Skogmo did you take any steps with reference to a termination of the lease of December 27th, 1943?

A. Yes, after some protests.

Q. You made various protests and then what did you do with reference to a termination of the lease? A. May I consult my notes a moment?

Q. Well, did you cause a notice to be served upon Gamble-Skogmo? A. Yes.

Q. That the lease was terminated by reason of the fact that they had not paid a proper rental?

(Testimony of Chester McNair.)

A. Well, we hoped it wouldn't come to that and we had some correspondence in connection with it and eventually we did serve such a notice.

Q. And that is the notice that is set forth in the plaintiff's complaint here, is it not? A. Yes.

Q. And can you tell me now about when that was done?

A. That notice was served—well, it was, I think, October 3rd, if I am thinking of the same notice.

Q. Yes, October 3rd, 1949?

A. October 3rd, 1949.

Q. Now after that—at that time did you have any information—and when I say "you"—did McNair Realty have any [284] information as to the amount of the wholesale sales and the farm sales which had been omitted from the accountings made by the Gamble-Skogmo Company over a period of years or the amounts which they owed you for rental? A. No information.

Q. For those items? A. No information.

Q. You had never received any such information from the Gamble-Skogmo Company? A. No.

Q. Did you take any steps to obtain that information?

A. Why, yes. You, as counsel, subpoenaed Mr. Cockayne and his records for a deposition.

Q. And his deposition was taken on October 24th, 1949? A. That is true.

Q. And at that time he produced the store records showing the total retail sales and the total wholesales in evidence? A. That is true.

(Testimony of Chester McNair.)

Q. And those are the store records which we have in court today, is it not?

A. That is true. [285]

\* \* \*

Q. And were you thereafter advised by me Mr. Williams had called me with reference to the matter? A. I was.

Q. Did Mr. Williams ever tell you they were in a position to write checks? A. Yes.

Q. In connection with the matter was that that afternoon, the afternoon of October 24th or the next day?

A. That was the next day in your office.

Q. And was there a meeting arranged for between yourself and Mr. Williams?

A. By the next day—

Q. And Mr. Hill and myself for the next day?

A. By the next day, you mean—

Q. That would be October 25th?

A. It was arranged. We met in your office in the morning.

Q. And briefly the three of you and Mr. Cockayne appeared in the office, did you not?

A. Yes.

Q. And did anyone have a checkbook?

A. I presume it was a checkbook. I didn't examine it sufficiently.

Q. Well, who opened the conversation in my office if you recall?

A. I believe Mr. Williams.

(Testimony of Chester McNair.)

Q. And did he identify himself as being the representative, [286] that is, attorney for the Gamble-Skogmo Company?

A. He identified himself as being counsel for the representative.

Q. And what did he say?

Mr. Williams: If the court please, at this time I would like to object to this line of testimony and any future line of testimony on the ground that the evidence shows that these negotiations were of a compromise nature and evidence of a compromise nature is not properly admitted in evidence.

\* \* \*

Q. And that didn't he make an offer so far as concerns [287] the disputed item of farm sales?

A. He said they worked during the preceding evening and arrived at a figure they thought represented 2% of the total sales.

Q. What was that figure? A. \$5,161.60.

Q. And how much did he offer to pay of that amount?

A. He said he was empowered to deliver us one-half of that amount in some sort of settlement.

Q. And what did you say to that?

A. I said the offer was refused.

Q. And did Mr. Williams say anything further?

A. He may not. Mr. Hill made some remarks.

Q. And what did Mr. Hill say after you had refused this offer?

A. Mr. Hill then said, "What do you want?"

(Testimony of Chester McNair.)

Q. And what did you say to that?

A. I said: "We don't want any compromise. We want the money that is due us and we want the premises that you have been occupying."

Q. And what did Mr. Hill say to that?

A. He said: "Why are we looked on with such disfavor as tenants?"

Q. And did you tell him?

A. I told him that over a six-year period—

Mr. Williams: Your Honor, I object to this line of [288] testimony as being incompetent, irrelevant and immaterial and also self-serving declaration.

The Court: Well, this Mr. Hill was questioned in regard to this same matter.

Mr. Hall: I have always understood where counsel brought out part of a conversation it was perfectly proper for the other side to bring out the entire conversation.

The Court: Yes.

Mr. Hall: Of course, it couldn't be under any circumstances a self-serving declaration.

The Court: Go ahead, tell him.

A. Mr. Hill asked me why they were such distasteful tenants and I proceeded to tell him.

Q. And after you had told them the reasons you considered them as distasteful tenants did Mr. Hill say anything further?

A. He said that was all quite true and he had only apologies to offer for their treatment of us in previous dealings.

(Testimony of Chester McNair.)

Q. And was anything further said by him with reference to the lease or the money?

A. Yes, he then inquired whether it would be possible on any footing for Gamble to treat with us for the premises for them to occupy the premises.

Q. And what did you tell him about that? [289]

A. I told him that when the premises were vacated they would be for sale to the best advantage or to our best advantage. They would be open to all comers and that Gamble could be treated on the same basis as any other prospective tenant wishing to lease the premises, and since he was on the ground floor at the moment if he wanted to enter into negotiations, then why we could talk with him first.

Q. And did you say anything about the Gambles or the fact that they were occupying the premises being given a preference or anything of that sort?

A. I said, yes, they had their fixtures in and there would be no lapse on business time or loss of sales or revenue and for that reason; I did tell him, however, that the terms of any new lease we might enter into would be far different from the terms of the former lease.

Q. Was there any further discussion in that meeting, Mr. McNair, with reference to the \$5,161.60 representing the percentage on the farm sales?

A. They said, they or one of them said it was correct to the best of their belief, it might vary a dollar or two or a few dollars, and if further search

(Testimony of Chester McNair.)

of the records disclose that, it would be rectified, and we said for all intents and purposes we would accept that figure, meaning that figure was authentic and we would also accept that amount in settlement. [290]

Q. Was there anything further said by either you—

The Court: I want to find out something further at that point from this witness. Does that mean, Mr. McNair, you would accept this \$5,161.60, or whatever it was, and continue the lease?

A. No, sir.

The Court: You wanted a new lease?

A. We wanted our premises and an end to this disagreeable situation, your Honor.

Q. (By Mr. Hall): In other words, to clear the matter up that Judge Pray just asked you, your position was that lease had been terminated, the old lease had been terminated on October 3rd?

A. Oh, yes, the lease was terminated.

Q. And you were demanding at that time first the payment of this \$5,161.60 and a new lease if Gambles desired to occupy the premises?

A. We didn't demand a new lease. We preferred to have the premises but as we took into account the fact they were in there we would treat them about a new lease and we wanted the \$5,161.60 in any event.

Q. And was there anything further said in the meeting in my office on October 25th between you or Mr. Williams, Hill or myself?

(Testimony of Chester McNair.)

A. Mr. Hill said something about reinstatement, or that [291] wasn't the exact term, but resuming the old lease, and I said there will be no reinstatement of the old lease. We just started to talk about the terms and conditions of a possible new lease. This was opening negotiations. Whereupon you said, "That is a matter wherein counsel needn't be concerned and Carter and I don't have to take up our time, why don't you and Mr. Hill retire to your office and work out anything you care to in regard to the matter."

Q. And about that time did you leave my office?

A. We thereupon left your office, Mr. Williams and Mr. Hill and myself.

Q. Mr. Cockayne?

A. And Mr. Cockayne. Excuse me.

Q. Did you all go together some place?

A. We went to my office.

Q. And who went to your office?

A. I believe Mr. Cockayne excused himself to go back to the store, Mr. Williams came up to the office with Mr. Hill and me and then shortly he left.

\* \* \*

Q. Well, did you resume operations later on that day so [292] far as negotiations were concerned?

A. Yes, we discussed tentatively the terms and conditions.

Q. And for about how long did you continue that meeting? A. In the afternoon?

(Testimony of Chester McNair.)

Q. Yes.

A. Oh, an hour or two, perhaps two hours, say.

Q. Did you at that time see a telegram that Mr. Hill had with reference to his authority to conduct negotiations?

A. I believe I did. I believe Mr. Hill showed me a telegram he had received.

Q. There has been a telegram introduced in evidence as Defendant's Exhibit 6, will you look at it please and state whether or not that is the telegram Mr. Hill showed you with reference to his authority to conduct negotiations for the Gamble-Skogmo Company? A. Yes.

Q. Your answer is yes? A. Yes.

Q. And what was the subject of the conversations which you had on the afternoon of October 25th over in your office?

A. Well, I did question Mr. Hill as to whether he had authority to represent this company, not to represent them in negotiations but whether he had authority to make conclusive arrangements or deal or something of that sort and he assured me he did have and this telegram—

Q. Corroborated that? A. Yes.

Q. And in addition to your questioning him about his [293] authority and things of that character, did you go ahead then with reference to any matters concerning the lease of December 27, 1943, or any other lease or other matters?

A. We had nothing to do with the old former

(Testimony of Chester McNair.)

lease. We entered into tentative discussion and details of a proposed new lease.

Q. Well was there any further discussion with reference to reinstatement or renewal of the lease of December 27th, 1943?

A. Oh, no, that was taken for granted by me at least that had been terminated.

Q. Well, did he appear to question it?

A. He didn't appear to question it.

Q. In any of his discussions with you?

A. Not in his discussions with me. [294]

\* \* \*

Q. Let me ask you this. Up to the point of coming to this minimum rental of \$12,000.00 or \$10,000.00 had there been an agreement between yourself and Mr. Hill with reference to the other terms of the new lease?

A. Every other detail had been ironed out.

Q. And agreed upon?

A. And agreed upon. [295]

\* \* \*

(Question read): Q. Now what have you to say with reference to the item of the 2% on the farm sales of \$5,161.60?

Q. (By Mr. Hall): Was that discussed at any time during these conferences between yourself and Mr. Hill?

A. Not after the very initiation of them; it was not discussed after that.

Q. Well, what do I understand by that, that

(Testimony of Chester McNair.)

there was or was not an agreement reached between you and Mr. Hill with reference to the payment of \$5,161.60? A. That was agreed.

Q. And was that contingent upon your continuation of the old lease or a new lease by McNair Realty Company and Gamble-Skogmo? [296]

A. No, I told Mr. Hill that if that was contingent upon anything, we couldn't talk about anything further.

Q. In other words, the discussions were at an end?

A. The discussions would be at an end. So when he proceeded I took it for granted that was not, that no new lease that that was not contingent upon anything.

Q. So that your understanding of the matter then was that Gamble-Skogmo were to pay McNair Realty Company the sum of \$5,161.60 whether a new lease were negotiated or whether they left the premises? A. That is correct.

Q. Now, how long did Mr. Hill stay here engaged in these conferences with you?

A. Until Friday evening. I forgot the date.

Q. It would be October 28th?

A. October 28th.

Q. Did he then leave Great Falls so far as you know? A. Yes.

Q. And do you know what his purpose in leaving Great Falls was?

A. To attend a meeting in Minneapolis.

Q. And for what purpose?

(Testimony of Chester McNair.)

A. To get the Company's consent to the minimum rental of \$12,000.00.

Q. That, I understand, was the only matter left between you?

A. That is my understanding. [297]

\* \* \*

Q. What is the nature of the small warehouse that is located upon the lot on First Avenue North?

A. It's a brick and tile and concrete and wooden building. The dimensions are forty by fifty feet. It sets approximately ten feet in from the alley and has a large door which would admit a truck, for instance, and inside it has a wooden balcony running around part of the area which is used for, can be used for storage.

Q. What was the building used for prior to the time you purchased it?

A. Warehouse building. [298]

Q. Continuously since it was built?

A. So far as I know.

Q. I believe Pinsky owned it?

A. Pinsky originally owned it.

Q. And was it also used as a warehouse by Strain Bros.? A. Yes.

Q. Do you know whether or not at any time the Gamble-Skogmo store used the building for a warehouse?

A. At the time we bought it it was occupied by Strains on a month-to-month warehouse tenancy. They vacated and Gambles immediately were given use of it.

(Testimony of Chester McNair.)

Q. And did they use it?

A. And did so use it.

Q. For storage purposes?

A. For storage purposes.

Q. And do you know whether or not furniture and tires and things of that sort had been stored in that premises for the period of time 1947 until 1949?

A. I know that merchandise of various sorts, of all kinds was stored there, yes. [299]

\* \* \*

#### Cross-Examination

By Mr. Williams: [300]

\* \* \*

Q. I am handing you Plaintiff's Exhibit 1 which purports to be a written lease dated December 27th, 1943, entered into between McNair Realty Company and Gamble-Skogmo, Inc., and I [301] point to paragraph 16 of that lease?

A. That is provision for termination.

Q. Yes. That provides that the lease may be terminated on certain contingencies happening, does it not? A. Yes.

Q. At your election or the election of the defendant? A. Yes.

Q. Now, I believe you stated that at the time you entered into this lease you expected it to run for the full period of ten years? A. Yes.

Q. Then am I to understand from that then that your expectation at that time was that the forfeiture

(Testimony of Chester McNair.)

clause would only be invoked as a security measure to insure the performance of the other provisions in the lease?

Mr. Hall: The termination clause you mean?

Mr. Williams: The termination clause; excuse me.

A. We didn't deal on our expectations of the termination.

Q. But you did expect that the lease would run ten years?

A. We expected the lease would be lived up to and run ten years. I could add to that a little if you would like to have me.

Q. Well, just a second. Now I ask you if—what was the purpose of the termination clause in the lease?

A. I don't know. This lease was furnished by Gamble-Skogmo.

Q. Then as far as you were concerned when you entered [302] into it you did not intend to use it, you had no intentions on the matter at all?

A. As of that date, no. [303]

\* \* \*

Q. Mr. McNair, I believe you testified yesterday somewhat on percentage leases, is that correct?

A. Yes.

Q. I understand you have approximately eleven percentage leases in your office at the present time?

A. Yes.

Q. I think you testified that the purpose of en-

(Testimony of Chester McNair.)

tering into a percentage lease was to permit the landlord to share in the profits in good years and the landlord's profit would not be so much in bad years?

A. That is one of the general theories. [304]

Q. Was that the fundamental purpose in which you entered into this lease involved in this lawsuit?

Q. You mean was that the reason we made a percentage lease?

Q. Yes.

A. Why, yes, it was. If Gamble-Skogmo Company did a business commensurate with what they held out to us they would do, we stood to gain through percentage arrangement; if their business was disappointing, they only paid a minimum.

Q. As a matter of fact the prime reason the landlord enters into any lease is to obtain rent?

A. Usually so; he does not give his property away.

Q. And I suppose the primary purpose in entering into this lease was to obtain rent?

A. That was the primary purpose.

Q. Now in this particular lease involved in this lawsuit that rent was to be paid in part by a fixed annual payment payable monthly, the annual payment being \$5400.00, was it not? A. Yes.

Q. And the monthly payments were \$450.00?

A. That was part of the rent, the guarantee and the additional, yes.

(Testimony of Chester McNair.)

Q. And then the percentage was over and above that guaranteed minimum payments?

A. Yes. [305]

\* \* \*

Q. Now, as I understand this case, you, as the President and the representative of the defendant, are contending that you are entitled to an accounting and rent on wholesale sales on these premises, do you not? A. I do.

Q. As a matter of fact the lease which is in evidence as Exhibit 1 provides that should lessee develop a general wholesale business on these premises, then 1% of such general wholesale sales will be paid to the lessor? A. 1%, yes.

Q. And that is upon in the event the lessee should develop a general wholesale business?

A. That is correct. [306]

Q. Have you ever been advised that there was no general wholesale business developed on those premises?

A. We have been advised verbally because we consistently asked for wholesale figures and were told that there were no wholesale figures on sales but we never had a written statement to that effect.

Q. Now, as I understand you, you have been advised only orally that there has never been a general wholesale business developed on these premises, is that correct?

A. Well, it is my recollection. There may be—I might be wrong.

Q. Now I am handing you Defendant's Exhibit

(Testimony of Chester McNair.)

No. 16 and I call your attention to a letter dated July 9th, 1946, which purports to come from Gamble-Skogmo, Inc., and is addressed to B. P. McNair Company. I further call your attention to the second paragraph of that statement on that letter and ask you if it does not say that there: "Regarding our percentage on general wholesale goods made on these premises there has been none as we have been operating Great Falls on strictly retail activity." Is that correct?

A. That is correct. We didn't go along with it but it is correct. I mean it is in that letter. There may be an answer to that. [307]

\* \* \*

Q. In other words, you are not familiar then with the bookkeeping procedure of retail stores generally? A. I am very familiar with it.

Q. You are familiar with it? Do you understand then that—are you familiar with the bookkeeping system of the Gambles department store here in Great Falls?

A. No, we could never find that out.

Q. Now, as far as you know, the figures which show on their books as wholesale sales could be sales to employees or sales or transfers of merchandise to other Gamble stores as far as you know?

A. They could set their sales up in any fashion they liked. We don't know what those sales might be. We didn't know there were such sales until we dragged their books into court by subpoena.

(Testimony of Chester McNair.)

Q. Have you ever made any request upon the plaintiff that he pay an exact sum as the percentage rental due you on wholesale sales?

A. No, we have not for the reason—yes—not for an exact sum, no. [308]

\* \* \*

Q. Now you state you have never made a request they pay an exact sum. Have you ever made a demand they pay an exact sum as a percentage rental on wholesale sales?

A. The only demand we made was for accounting on such sales so a sum could be determined to demand.

Q. Now have you ever requested access to the books and sales reports in the Great Falls Gambles department store to determine what those wholesale sales were? A. Never.

Q. Have you ever demanded access to those books and sales reports?

A. Not to the books. We demanded many times a report from the officers as to the amounts of those sales.

Q. But you have never made a demand to have access to the books themselves?

A. Yes, at the time they were subpoenaed that was a demand to see the books.

Q. And that subpoena was sometime after October 3rd, was it not?

A. October, yes, a little after October 3rd.

Q. This notice that the lease was terminated was

(Testimony of Chester McNair.)

signed [309] and served on October 3rd, 1949, was it not?

A. Yes, and it was because we could not get proper reports.

Q. But at the time then on October 3rd when you served a notice the lease was terminated you had never demanded actual access to the books and sales reports here in Great Falls?

A. At that time we were relying on the fact that we had been advised there were no wholesale sales. We didn't then know there had been \$88,000.00 worth of sales; that was later disclosed after we found these books.

The Court: Mr. McNair, would you answer the question and then if these other things must be brought out your attorney can bring them out.

A. What was the question.

(Question read): Q. But at the time then on October 3rd when you served a notice the lease was terminated you had never demanded actual access to the books and sales reports here in Great Falls?

The Court: Just answer it yes or no.

A. No.

The Court: Your attorney will take care of any other matter.

Mr. Williams: At this time, your Honor, I would like to move that portion of his previous answer which was not [310] responsive be stricken.

The Court: Well, it may go out; it is not a proper answer.

The Witness: Your Honor, if the court please.

(Testimony of Chester McNair.)

I am a prejudiced witness and I can't help it. I will try to follow.

The Court: No explanations necessary. You have a competent counsel here to take care of you.

Q. Have you ever started any legal proceedings prior to October 3rd, 1949, to determine the amount of the wholesale sales?

Mr. Hall: We object to this as immaterial.

The Court: Well, I don't know. You could answer the question.

A. Will you read the question?

(Question read): Q. Have you ever started any legal proceedings prior to October 3rd, 1949, to determine the amount of the wholesale sales?

A. No legal proceedings.

Q. Except for the one time when the books of the store were subpoenaed, which was approximately October 19th, 1949, did you ever demand an audit of those books by an accountant employed by you or a neutral accountant? A. No.

Q. Now during the years that Mr. Cockayne has been manager of this store you and he have been quite friendly, have you not? [311] A. Yes.

Q. You have spent some time down in the Gambles department store, I assume?

A. I have been there on two or three occasions, maybe three or four.

Q. In the two or three years he has been there you have been there on three or four occasions?

A. Possibly.

(Testimony of Chester McNair.)

Q. At those times when you were there did you ever ask Mr. Cockayne for any sales figures?

A. Only once.

Q. That was sometime in 1948, was it not?

A. Yes.

Q. And did Mr. Cockayne give you those sales figures? A. Yes, he did.

Q. Did he give you exact figures?

A. He gave me exact figures.

Q. Has Mr. Cockayne ever refused to give you any figures?

A. No, I never asked him but the once.

Q. Now at any time prior to the deposition of Mr. Cockayne were you able to obtain the exact figures as to the amount of farm sales made?

A. No.

Q. Did you ever make a demand or request to the plaintiff that he pay an exact figure on the farm sales during the year 1948?

A. Not an exact figure; we didn't know it. [312]

\* \* \*

Q. Now you or the defendants subpoenaed the books of the plaintiff at the time the deposition of Dale Cockayne was taken in the Montana State District Court, did they not?

A. That is correct. [313]

Q. The defendant, Mr. Cockayne, furnished those books and sales reports? A. He did.

Q. His deposition was taken, was it not?

A. It was.

(Testimony of Chester McNair.)

Q. And those books and sales reports were turned over to the reporter who took the deposition, were they? A. They were.

Q. And after they were turned over to him it was understood between Mr. Hall and myself that both the plaintiff and the defendant would have access to those books, is that correct?

A. That is correct.

Q. Did the plaintiff have access to those books after that time?

A. The plaintiff had those books for a matter of several days until after Mr. Hill's return to Minneapolis and then at some later date in October the defendant had access and used those books.

Mr. Hall: You said Mr. Hall.

A. I meant Mr. Hill, excuse me.

Q. Now since the defendant has had access to the books has it ever made a demand upon the plaintiff for any exact figure claimed under wholesale sales?

A. We couldn't. This present action was filed before we had access to those books.

Mr. Williams: Your Honor, I ask that that [314] answer be stricken as not responsive to the question.

The Court: Yes, just answer the question.

The Witness: Read the question.

(Question read): Q. Now since the defendant has had access to the books has it ever made a demand upon the plaintiff for any exact figure claimed under wholesale sales?

(Testimony of Chester McNair.)

A. No, sir.

Q. Since the defendant has had access to the books has the defendant ever made a demand upon the plaintiff for the, an exact amount claimed under the sales of unit 5 or farm store sales items?

A. I don't know how to answer that. No.

Q. Now has there ever been a time during the duration of the lease when the defendant has demanded or requested an audit of the actual sales reports when it was refused?

A. You are speaking of audit now?

Q. I am speaking of audit now.

A. No audit has ever been refused.

Q. Has access to the books ever been refused since the beginning of this lease?

A. No. [315]

\* \* \*

Q. I believe you testified on direct examination that the defendant had spent some money remodeling and repairing the premises in question, is that correct?

A. That the defendant had spent some money?

Q. Yes. A. That is correct.

Q. Most of those expenditures were made prior to occupancy by the plaintiff, were they not?

A. In 1943 when the negotiations were under way with Mr. Hoben it was well known to both of us that a new tenant required certain remodeling for his particular purposes. It was agreed between us at that time that the landlord would assume certain of the remodeling expense and the

(Testimony of Chester McNair.)

tenant would assume certain. Gamble Company expended in the neighborhood of \$3,000.00 by an arrangement and we expended a little over \$6,000.00 in those remodelings.

Q. And these expenditures were made pursuant to the terms of the lease, were they not? That is, this provision [316] in your lease you would make certain repairs and alterations?

A. That is right.

Q. And that is what your money was expended for? A. I presume it is in the lease.

Q. Now I suppose when a store is remodeled it is done for the primary reason to attract more customers for retail sales? A. That is right.

Q. And as a natural consequence if sales increase the rental increases after you get above the minimum?

A. If there is any excess developed.

Q. And of course at the termination of the lease these premises will ultimately revert to the defendant, will they not? A. I hope so. [317]

\* \* \*

Whereupon said Plaintiff's Exhibit No. 18, offered [318] and received in evidence, is in words and figures as follows, to wit:

(Testimony of Chester McNair.)

PLAINTIFF'S EXHIBIT No. 18

C. S. McNair, W. Robt. Gilchrist, Manager; B. P. McNair.

Established 1893

B. P. McNair Company

Insurance in all lines

Real Estate, Loans and Rentals

First National Bank Building

Great Falls, Montana

September 18, 1945

Mr. Ken Watters  
Gamble-Skogmo, Inc.,  
700 Washington Avenue North  
Minneapolis, Minnesota

Dear Ken:

We have arrived at a point where we can do something with the owner of the garage building across the alley from your Great Falls location.

He, however, wishes to make a long term lease and to participate in some fashion with us under a percentage of sales with a reasonable minimum guarantee.

The matter is going to be somewhat complicated as it will have to be a three-cornered deal and I would suggest that it better be handled by direct negotiation rather than by correspondence. Hope you or Mike can arrange [319] to be here shortly and if so please let us know in advance so we can have the owner in town as he travels a good deal.

We have now completed the purchase of the

(Testimony of Chester McNair.)

little warehouse property with the vacant front end, also across the alley from you and the tenant has moved out. It is now available at \$60.00 per month for your use, including both building and the vacant ground 50x100, fronting on First Avenue North. Since it is standing idle we would appreciate word from you on this at once. It can be leased for any term you like but would be a separate deal and not tied in with your other.

Please write us by return air mail on these various points. Best regards to yourself and Mike.

Yours sincerely,

B. P. MCNAIR COMPANY.

/s/ By C. S. MCNAIR.

ew/

Air mail.

---

Q. (By Mr. Williams): Now are those premises containing that warehouse and the vacant lot on First Avenue North, are they still leased by virtue of an oral lease?

A. Yes, month to month tenancy. I don't know what you call lease. It is difficult. [320]

\* \* \*

Mr. Williams: We offer in evidence Plaintiff's Exhibit 19.

Mr. Hall: No objection.

The Court: It may be received in evidence.

Whereupon said Plaintiff's Exhibit No. 19, of-

(Testimony of Chester McNair.)

ferred and received in evidence, is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 19

C. S. McNair, W. Robt. Gilchrist, Manager; B. P. McNair.

B. P. McNair Company  
Established 1893 [321]

Insurance in all lines

Real Estate, Loans nd Rentals

First National Bank Building

Phone 2-1094

Great Falls, Montana

May 28, 1946

Mr. Mike F. Hoben  
Real Estate Department  
Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minnesota.

Dear Mike:

Your undated letter of approximately April 8, to the attention of my brother and enclosing separate lease forms for Lot 5, Block 316, Great Falls, together with small warehouse building thereon at the rate of \$60.00 per month, has gone unanswered for the reason that I have been in the hospital in Missoula and my brother was awaiting my return.

We note your remarks as to the "unreasonableness" of this flat lease. The fact is, however, that this is at total variance with our verbal understanding had with Ken Watters at the time he and

(Testimony of Chester McNair.)

your construction engineer, Mr. Hill, were first in Great Falls together, and inspected the ground in question. It was through Mr. Watters' recommendation that we bought this property, thinking, of course, that it would benefit your operation here and in the long run, ourselves.

This understanding was as follows: If we could acquire [322] the lot in question and/or the two-story brick building at the corner of the same block, that either of them or both would be added to the lease schedule on the original premises with an increased minimum annual rental guarantee and the same percentage of sales.

If you will recall, we had dragged out negotiations for over a year on the corner building, pending a commitment from yourselves, which we were never able to obtain. The owner finally became disgusted and made other disposition of his building.

We did, however, buy the lot in question for your program. I am sure that if you will discuss the matter with Ken and Mr. Hill, they will each recall the circumstances of our verbal understanding prior to the purchase of this ground. This also was further covered in letters from my brother under dates of December 4, 1945, and January 31, 1946. It took your office something over two months to reply to the January 31 letter and then the form enclosed for our signature differed entirely from our understanding.

If you wish to prepare a new lease, and without

(Testimony of Chester McNair.)

delay, covering both properties, increasing the minimum by the \$60.00 per month and including all sales, whether from the original store premises, the vacant ground or the warehouse building, under the percentage agreement, we will still stick with our original understanding. This would be in your favor, as you [323] consistently report sales at less than your minimum and would thereby allow you a slack of an additional \$720 per year to build up to before any excess becomes effective.

As the matter now stands, this letter serves as notice that you have the warehouse lot and vacant ground on a month to month basis only and that upon due notice, we may sell or make other disposition of the property in question.

Yours very truly,

B. P. McNAIR COMPANY,

By /s/ C. S. McNAIR,

C. S. McNAIR. [324]

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Q. And that signature is B. P. McNair Company by C. S. McNair, is it not?

A. That is correct.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 20.

Mr. Hall: No objection.

The Court: It may be received in evidence.

(Testimony of Chester McNair.)

Whereupon said Plaintiff's Exhibit No. 20, offered and received in evidence, is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT No. 20

B. P. McNair Company  
Established 1893  
Real Estate—Insurance  
Great Falls, Montana

June 8, 1948

C. S. McNair,  
B. P. McNair, Jr.,  
Gamble-Skogmo, Inc.,  
15 North Eighth Street,  
Minneapolis 3, Minn.

Attention: Real Estate Department

Dear Sirs:

This is to advise you that beginning August first next, the rental on the warehouse property together with the vacant ground adjoining, all being Lot 5, Block 316, Great Falls, Montana, is hereby increased to \$90.00, instead of \$60.00 monthly as heretofore.

Yours very truly,

B. P. MCNAIR COMPANY,  
By /s/ C. S. MCNAIR,  
C. S. MCNAIR.

CSMcN :hc

c.c. Mr. Dale Cockayne, Mgr.  
Gamble Store,  
Great Falls, Montana.

(Testimony of Chester McNair.)

Q. (By Mr. Williams): Have there been any changes in the, any written notification of rental terms of that warehouse or those premises since the letter which has been introduced in evidence as Plaintiff's Exhibit 20?

A. Been any change in what?

Q. Has there been any written notification of change [326] in the terms of that lease?

A. No.

The Court: I think probably the reporter would like a rest at this time. We will take a recess.

(11:10 a.m.)

(Court resumed, pursuant to recess, at 11:20 o'clock a.m., at which time the parties and all counsel were present.)

The Court: Proceed.

### CHESTER McNAIR

resumed the stand and testified as follows:

#### Cross-Examination

(Continued)

By Mr. Williams:

Q. Mr. McNair, I hand you this letter marked Plaintiff's Exhibit 21, which purports to be a letter from Gamble-Skogmo, Inc., to McNair Realty Company, which is undated, although it contains a pencil marking "4/8/46" with a question mark.

A. That is my writing.

(Testimony of Chester McNair.)

Q. And bears the signature Mike F. Hoben. Is the pencil writing "4/8/46" your writing?

A. Yes.

Q. And did you receive this letter from Gamble-Skogmo, Inc.? A. Yes.

Q. Did you receive it in the normal course of mail? A. Yes.

Q. And this letter has something to do with the leasing [327] of the warehouse, has it not?

A. Yes. It is addressed to my brother, Ben, but I can identify it.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 21.

Mr. Hall: No objection.

The Court: It may be received.

(Whereupon said Plaintiff's Exhibit No. 21, offered and received in evidence, is in words and figures as follows, to wit:)

#### PLAINTIFF'S EXHIBIT No. 21

Gamble-Skogmo, Inc.,  
Operating Gamble Stores  
15 North Eighth Street  
Minneapolis 3, Minnesota  
Main 0281

4/8/46? (Pencil writing.)

McNair Realty Co.  
Great Falls, Mont.

Attention: B. P. McNair.

Dear Ben:

We are enclosing a corrected lease proposal on

(Testimony of Chester McNair.)

the warehouse property in Great Falls as you requested, and trust that it will be satisfactory.

The only item different than your suggestion is the one regarding a percentage on sales in the warehouse and lot, and our Merchandising Department objects very strenuously to [328] this. I also feel that it is an item differing entirely from our original program and really not applicable in this case. I feel that you and Chet will see the reasonableness of this.

Thanking you and with kindest regards to each of you.

Sincerely yours,

GAMBLE-SKOGMO, INC.,

/s/ MIKE F. HOBEN,

Real Estate Department.

(Pencil notation.)

Unsatisfactory—not in accord with understanding  
—no answer.

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Q. I believe there has been some testimony in this trial that there were some repairs and improvements made on [329] the Gamble department store premises during the year 1946?

A. Yes.

Q. There were such repairs and improvements made, were there not?

A. I wouldn't say repairs; there were improvements on—

Q. On arches?

A. On arches, yes.

(Testimony of Chester McNair.)

Q. And as the owner of the building the defendant knew of these before they were made, did they not?

A. Yes, the plaintiff asked our consent and asked us to participate.

Q. And prior to the time that the store was remodeled; would remodeling be a correct term to use on what took place at that time?

A. Yes.

Q. Prior to the time the store was remodeled I believe the reports show that there was less than \$270,000.00 net retail sales?

A. That is correct.

Q. At any rate you did not receive any percentage rental for the first two lease years, did you?

A. That is correct, excess rental. We received the minimum rental guaranteed.

Q. And I suppose part of the purpose of putting in these repairs in doing this remodeling was to increase the volume of sales?

A. Oh, unquestionably.

Q. And when the remodeling was done did the volume of sales increase as far as you know? [330]

A. I believe they did increase.

Q. At any rate you received more rental thereafter? A. That is correct.

Q. In fact you received some percentage rental after this remodeling was done, isn't that right?

A. That is correct.

(Testimony of Chester McNair.)

Q. Now when the remodeling was done did you encourage that remodeling or discourage it?

A. I dare say we encouraged it.

Q. What was the reason for your encouragement?

A. In the hopes that a satisfactory sales volume would be achieved.

Q. It was your belief, was it not, that the remodeling would increase the sales volume and consequently increase your rental?

A. That is correct.

Q. Now I believe you just stated that you had up until 1946 at any rate you had always received the minimum rental, is that correct?

A. Up until 1946 you mean for 1944 and 1945?

Q. Yes. A. Yes.

Q. In other words, the rental on the lease in question is paid in two ways, then, is it not?

A. It is.

Q. Part of that is the percentage and the other part is the guaranteed minimum, is that correct?

A. That is correct. [331]

Q. What is that guaranteed minimum annually?

A. \$5,400.00.

Q. And how is it paid?

A. Monthly in advance. That is, one-twelfth of the annual amount monthly in advance.

Q. Now as I understand your contentions and the contentions of the defendant there has been no objection made at least as to these monthly payments? A. None.

(Testimony of Chester McNair.)

Q. And they have come in from month to month in advance?

A. Very promptly and satisfactorily.

Q. Was there a letter of transmittal with those monthly checks?

A. There may have been occasionally; usually I think not. They just came in the mail in an envelope with no letter.

Q. How were those checks dated; they were dated, were they not?

Mr. Hall: You mean what date did they bear?

Q. Yes.

A. I think they bore usually, I think they bore the date of the current month, first day and received approximately on that day.

Q. At any rate they were normally dated somewhere near the first of the month, is that correct, of the month they were to pay rent?

A. Yes. [332]

Q. And did they contain on them the designation "rent check"?

A. I believe they did, but there was one thing they didn't contain as rent for what or when or where.

Q. But in the normal course of these five years in which you received them they were paid on or near the first of the month and they were rent for the premises involved in this lease, were they not?

A. Why yes.

Q. What was your answer? A. Yes.

Q. And they, did they bear the name of the plaintiff on the check?

(Testimony of Chester McNair.)

Mr. Hall: May it please the court, we raise no question in this case and I don't believe there is any issue with reference to the payment of this monthly minimum down to the month of November, 1949. There is no question raised about it. If counsel wants such a stipulation, we will gladly give it to him.

Mr. Williams: My purpose is not that, your Honor. Of course, one of the issues in this case is full performance on the part of the plaintiff and if I may continue I will——

The Court: Go ahead.

Q. Now after you received these checks they were normally deposited in the bank, were they not?

A. Oh, yes, the day they were received. [333]

Q. And on the back——

A. Well we have dealt with different banks and it might have been anyone of several.

Q. What bank have you used during the year 1949? A. McNair Realty Company?

Q. Yes. A. Two banks.

Q. What are those two?

A. One is the Montana Bank and Trust and one is the First National Bank of Lewistown.

Q. Of Lewistown? A. Yes.

Q. Do you normally deposit that check in the Lewistown bank?

A. Not normally. It probably would go into the Great Falls Montana Bank and Trust.

(Testimony of Chester McNair.)

Q. And I assume you used a deposit slip when you deposited it?

A. That I couldn't say. The Cashier—the book-keeper takes care of that.

Q. Did you sign these checks or use a stamp?

A. Oh, they would be rubber stamped.

Q. And would there be any record in your office as to these payments?

A. Oh, yes, they would be credited to the proper account. [334]

Q. Now did you receive a check for the rent for October of 1949?

A. I can't say. I presume so.

Q. But you don't know? A. No.

Q. Do you have your records available?

A. I have. My counsel has.

\* \* \*

Q. I believe these are your store records, are they not, Mr. McNair, or your office records?

A. Yes, that was prepared in our office.

Q. And do those records show that the rent check for the month of October, 1949, was received?

A. Yes.

Q. Does it show whether or not that check was cashed?

A. No, it doesn't, but I would take it from this that [335] it came into our office and was deposited on October 3rd, the morning of October 3rd.

Q. As far as those records?

A. As far as these records disclose. I don't personally deposit it or cash it.

(Testimony of Chester McNair.)

Q. There is a possibility those records could be incorrect? A. There is.

Q. I hand you this document marked Plaintiff's Exhibit 22, which purports to be a check from Gamble-Skogmo, Inc., on the left side it bears the words "date of check," and the figures 10, then a space 03 and then a space 9. It is made payable to McNair Realty Company, Great Falls, Montana, and is in the amount of \$450.00. In the upper righthand corner it says "rent check." Does that appear to be one of the regular rent checks you have received from the plaintiff? A. Yes.

Q. And this is comparable to the checks which you have received monthly from the plaintiff, is it not?

A. As far as I recall. I think it is exactly similar.

Q. And on the back this check contains an endorsement, does it not, which is a stamp "Pay to the order of the Montana Bank and Trust Co." and bears also the signature McNair Realty Company, B. P. McNair Company by B. P. McNair?

A. Not signature, just—

Q. The rubber stamp?

A. With rubber stamp. [336]

Q. Is that the stamp generally used in your office?

A. I haven't examined it. I think so.

Mr. Williams: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Hall: No objection.

(Testimony of Chester McNair.)

The Court: Received in evidence.

(Whereupon said Plaintiff's Exhibit No. 22, offered and received in evidence, is in words and figures as follows, to wit:)

PLAINTIFF'S EXHIBIT No. 22

Gamble-Skogmo, Inc.  
Operating Gamble Stores  
Minneapolis, Minnesota

Rent Check G 143A

Date of check

Mo. Day Yr.

10 03 49 12821

No. 22901

McNair Realty Company  
Great Falls, Montana

Amount  
450.00

Northwestern National Bank of Mpls.  
Payable Only at Main Office  
17-1 Minneapolis, Minnesota 17-1

/s/ ?

G/S GAMBLE SKOGMO,  
INC.

A.C.N.

(Testimony of Chester McNair.)

(Reverse side.)

Pay to the order of  
Montana Bank and Trust Co.  
482 Great Falls, Montana 482  
McNair Realty Company  
B. P. McNair Company  
B. P. McNair  
Oct. 7, 1949 [337]

Pay to the Order of  
Any Bank or Federal Reserve Bank  
Prior Endorsements Guaranteed  
American National Bank  
St. Paul, Minnesota  
22-7  
The American National Bank  
St. Paul, Minn.

Pay to the order of  
Any Bank, Banker or Trust Co.  
Or through the Local Clearing House  
Oct. 5, 49, 85 59  
Prior Endorsements Guaranteed  
Montana Bank and Trust Co.  
Great Falls,  
93-518 Montana 93-518

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Q. (By Mr. Williams): Was this check in question deposited in the bank so far as you know?

A. So far as I know.

Q. And was it ultimately paid?

A. So far as I know.

(Testimony of Chester McNair.)

Q. The bank has never made a demand on you since the date it was deposited to return the money?

A. I think it was honored at the other end.

Q. Did you ever make an objection to the receiving of the October rent? Did you ever make an objection to receiving this check which is Plaintiff's Exhibit 22? [338]

A. No.

Q. After you deposited that check did you ever return the \$450.00? A. No.

Q. You did receive monthly rent checks comparable to Plaintiff's Exhibit 22 for the month of November and December, did you not?

A. Yes. [339]

Q. Have you at any time during the course of the lease involved in this lawsuit ever given the plaintiff a written notice to pay rent or vacate the premises?

Mr. Hall: What do you mean, three-day notice under [340] the statute?

Mr. Williams: I am merely asking him if he ever gave them written notice to pay rent or vacate the premises in the alternative?

Witness: That may have been contained in a notice that we gave them.

Q. You don't know whether it was or was not?

A. Without refreshing myself I wouldn't be too sure.

Q. If you did give such a notice, would you know whether or not it specified the exact amount of the rent claimed?

(Testimony of Chester McNair.)

A. I doubt if it did. We didn't know the exact amount.

Q. Now in the event the plaintiff makes a payment of any back rent which has been claimed by the defendant together with interest and court costs, are there any further damages which the defendant has suffered?

A. In what connection; damages of what nature?

Q. Well as I understand it your contention is, the defendant's contention is that there has been non-payment of rent?

A. That is one of the contentions.

Q. And that—what are the other contentions?

A. That we could not get a statement of the business done on the premises.

Q. Now if you obtained a complete audit or accounting of the sales on the premises made by your own auditor or [341] accountant and received all back rent which that auditing or accounting showed, would there be any other damages which the defendant has suffered?

A. That would have to be gone into and an examination made of the physical condition of the building and that has not been done.

Q. So far as you know the physical condition of the building has not been damaged, has it?

A. Oh, it's been. Yes, there's been a partition taken out upstairs and in the basement. There was a large portion of the concrete floor on the first floor chopped out so as to provide a stairway

(Testimony of Chester McNair.)

for the public down into the basement, another tenant or tenacy might require all of those things replaced. That would be a matter that would take a little consideration.

Q. But you are not making any claim at this time?

A. At this moment I don't know whether there would be a further claim from that standpoint or not.

Q. Are you making a claim for any other damages, other contentions?

A. We haven't made any claim for any damages. [342]

\* \* \*

Mr. Williams: If the court please, in order to save some time in this case the counsel for the plaintiff and counsel for defendant have entered into a stipulation that the check which is in evidence as Plaintiff's Exhibit 22 was deposited in the Montana Bank and Trust Company on October 5th, 1949.

The Court: Very well.

Mr. Williams: And we have also entered into a stipulation that the original bank deposit of the Montana Bank and Trust Company showing this deposit of the check which is Plaintiff's Exhibit No. 22 may be received in evidence.

The Court: Very well, it may be received in evidence.

Mr. Williams: At this time we offer in evidence Plaintiff's Exhibit 24.

(Testimony of Chester McNair.)

Mr. Hall: I have already agreed it may be admitted.

The Court: It may be received in [343] evidence.

(Whereupon said Plaintiff's Exhibit No. 24, offered and received in evidence, is in words and figures as follows, to wit:)

PLAINTIFF'S EXHIBIT No. 24

Deposited with Montana Bank and Trust Co.  
Great Falls, Montana Oct. 5, 1949

McNair Realty Co.

Please list each check separately

Currency ..... 222.00

Silver .....

Checks as follows:

Coast to Coast ..... 303.00

Gambles ..... 450.00

J. J. Newberry ..... 900.00

Buttreys ..... 253.00

Oct. 5 2,128.00 D4

39

Original Total ..... 2,128.00

See that all checks and drafts are endorsed

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Q. (By Mr. Williams): Mr. McNair, I believe that after the conference in Mr. Hall's office on October 25th, 1949, you and Mr. Hill entered into a series of negotiations by yourselves, did you not?

A. That is right.

(Testimony of Chester McNair.)

Q. And then after some negotiation between you and Mr. Hill there was another meeting in Mr. Hall's office, was there not?

A. I believe so.

Q. What was the date of that meeting?

A. Wouldn't that be the following day; wouldn't it be the 26th? I am not positive as to that.

Q. I believe the testimony here is that it was October 27th at ten o'clock a.m. Does that sound reasonable to you and correct?

A. That sounds reasonable.

Q. Now who was present in that conference?

A. I am trying to remember whether Mr. Cockayne was there. The others were, Mr. Hill and yourself and Mr. Hall and myself.

Q. You don't remember whether Mr. Cockayne was there or not? A. I am not too sure.

Q. As that conference opened the plaintiff made another offer, did it not?

A. Could you refresh me on the terms.

Q. Well as a matter of fact the offer was made by me, was it not? [345]

A. If I recall what offer—you see there was so much conversation at different days.

A. Very well, did I at that time make an offer on behalf of the plaintiff to pay 2% on all past sales of farm store items, plus 2% on all future sales of farm store items during the life of the lease dated December 27th, 1943; do you remember those offers? A. Was there any further?

Q. Yes, there was further. There is more to

(Testimony of Chester McNair.)

the offer than that. Do you remember those parts of it?

A. If you put the whole text together.

Q. Up to now you don't remember my making that part?

A. I am rather hazy as to what took place on a given day in a given room.

Q. Do you remember in that particular conference my having a yellow pad in front of me and stating that we were prepared to make a second offer of any kind?

A. Yes, I believe I do. I don't know about the yellow pad.

Q. You don't remember what the offer was?

A. No, I don't remember what the offer was.

Q. Do you remember whether or not that offer was accepted?

A. To the best of my recollection no offer was accepted as tying in those various things you speak of because there [346] was no need of it.

Q. Do you remember whether or not as part of that offer I stated that if accepted it was to be contingent upon the old lease remaining in effect and a full settlement of all claims?

A. I remember conversation of that effect and it is my understanding that we made it plain the old lease was a dead issue.

Q. Then my offer did contain the provision that the old lease must remain in effect and that offer was refused?

A. Oh, it would have to be, yes.

(Testimony of Chester McNair.)

Q. At that time do you remember did anybody representing the plaintiff admit the liability for the 2% on past farm sales in a sum of approximately \$5,161.60?

A. I couldn't quote words but it was my understanding that that money was owed and the—it was tacitly acknowledged by virtue of the fact that we were even talking about a new lease.

Q. Do you remember any words that I or any Gamble representative used in which we admitted that we owed the sum of—for past farm rental on farm sales?

A. I couldn't quote exact conversation.

Q. But it was understood by you that we did admit that we owed that amount of money?

A. Yes, and it was so understood. [347]

Q. There is no question in your mind that we offered to pay that amount of money, is there?

A. No, you offered to pay the money.

Q. Is there any question in your mind that our offer to pay was contingent upon the old lease remaining in effect?

A. The offer of half payment and contingency of re-establishing the old lease was refused.

Q. And that was the first offer?

A. That was the first offer.

Q. Now the offer of full amount paid and the old lease remaining in effect was that accepted or refused?

A. It was refused so long as it contained the contingent about the old lease.

(Testimony of Chester McNair.)

Q. Now in the conference I am talking about on October 27th was there any admission by myself or any of plaintiff's representatives that the old lease was terminated?

A. Excepting only tacit admission.

Q. Can you recall who made the tacit admissions?

A. Well the fact that you people were talking a new lease was premised upon the assumption the old lease was an old issue and the money owed and would be paid.

Q. But you can't remember which if any representative made that tacit admission?

A. No, I think that I made the condition quite clear.

Q. Was there any admission by anybody in that conference [348] as to when, that is, any admission by any of the representatives of the plaintiff as to when the premises would be vacated?

A. No.

Q. Then it was your understanding that the plaintiff admitted that the lease was terminated but not that it would surrender possession, is that correct?

A. No, you see—that is correct.

Q. Now subsequent—now did you accept that figure of—I believe you stated you did not accept that figure of \$5,161.60 as made in an offer which involved the old lease remaining in effect?

A. You mean accept the figure as being—

Q. No, did you accept the offer as such? I

(Testimony of Chester McNair.)

believe you just testified you did not accept it as such? A. The figure was acceptable.

Q. You did accept the figure, did you not?

A. By figure do you mean the cash book or being the correct amount in dispute or what?

Q. Well what I want to know is first of all I believe you already testified you did not accept the offer on the part of the plaintiff to pay that amount of money if it meant the old lease was to remain in effect? A. Correct.

Q. But you would accept the figure as being substantially correct?

A. As being substantially correct. [349]

Q. As a matter of fact part of that offer was to pay whatever figure the record showed as being correct?

A. Yes, insofar as farm sales were concerned. That would not include wholesale sales.

Q. Now as I understand it it was your tacit understanding that we agreed to pay that sum of \$5,161.60? A. That is correct.

Q. And you were willing to accept that payment, were you not?

A. Yes, with no strings attached. [350]

\* \* \*

Q. During this period of negotiation at any time in my presence was there an admission on behalf of the plaintiff that the old lease was terminated? A. Yes. [351]

\* \* \*

(Testimony of Chester McNair.)

Redirect Examination

By Mr. Hall:

Q. Now do I understand, Mr. McNair, at no time during the conferences held between you and Mr. Hill that there was any agreement on his part to pay this \$5,161.60?

A. He agreed to pay that.

Q. Well was that an actual agreement to pay or was it a tacit agreement to pay, something you understood?

A. I know that was agreed to be paid.

Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales? A. Yes.

Q. For the period 1947, 1948 and 1949 down to October 19th? A. Yes.

Q. Now during your cross-examination you were asked whether or not you made any demands upon the plaintiff with reference to the percentage claimed due on wholesale sales and I believe you said you had made no such demand?

A. For a fixed figure.

Q. That is right? A. No.

Q. And why was no such demand made?

A. Because we had no way of fixing a figure. We made demands but not for a fixed figure.

Q. The store records did not become available until sometime after November 1st, did they, so far as you are [352] concerned?

A. That is correct.

(Testimony of Chester McNair.)

Q. From the office of Mr. Silk, the Notary Public, who took Mr. Cockayne's deposition they were sent back down to the Gamble store?

A. That is right.

Q. At the request of Mr. Cockayne for store purposes? A. That is right.

Q. And on November 1st the present action was filed, was it not? A. Yes.

\* \* \*

Q. State whether or not that was the reason you made no such demand; that is, the reasons you have just given?

A. Yes, we couldn't make a demand in a fixed figure.

Q. Now in reference to the question propounded to you by counsel for the plaintiff with reference to a demand for the amount due as a percentage on sales from unit 5 I believe [353] you told counsel that you had made no such demand for any fixed amount?

A. Not for any fixed amount.

Q. And why didn't you make it?

A. For the same reason, we had no access to figures to set a fixed figure.

Q. And that would be true up until you had received a figure, would it not?

A. That is true.

Q. And after you had received a figure was there any reason why you did not make a demand?

A. There was no necessity for demanding then.

Q. Why was not there necessity for demand?

(Testimony of Chester McNair.)

A. The figure was agreed on between the plaintiff and ourselves as correct.

Q. I assume that you mean between plaintiff —you mean Mr. Hill, do you not?

A. Mr. Hill, that is right. [354]

\* \* \*

Q. I show you a letter which has been marked for identification proposed Defendant's Exhibit 26 and ask you to state whether or not your signature appears upon the bottom of that letter?

A. Yes, that is my letter.

Mr. Hall: This letter, may it please the court, was produced at my request by Mr. Williams from the files I assume of Gamble-Skogmo, Inc.

Mr. Williams: That is correct.

Mr. Hall: We offer in evidence Defendant's Exhibit 26 for the defendant.

Mr. Williams: No objection.

The Court: Very well, it may be received in evidence.

(Whereupon said Defendant's Exhibit No. 26, offered and received in evidence, is in words and figures as follows, to wit:)

(Testimony of Chester McNair.)

DEFENDANT'S EXHIBIT No. 26

B. P. McNair Company  
Established 1893  
Real Estate—Insurance  
Great Falls, Montana

March 30, 1949

C. S. McNair  
B. P. McNair, Jr.  
Gamble-Skogmo, Inc.,  
15 North 8th Street [355]  
Minneapolis 3, Minnesota.

Attention: Mr. William T. Hill  
Real Estate Department

Dear Sirs:

This will acknowledge your two letters of December 30, 1948, and March 25, 1949, enclosing checks for \$2,862.07 and \$2,017.30, respectively.

These letters purport to be sales reports for certain quarterly periods. As letters they are interesting but they scarcely constitute reports such as we are entitled to.

Furthermore, the total figures contained therein are extremely disappointing. We still have to point out to you that no report is made as to so-called farm sales and that if such figures have been included in the totals given in your letters then these totals are increasingly disappointing.

We are crediting your account with the checks in question as being simply payments on account.

As we have done before, we here and now make

(Testimony of Chester McNair.)

formal demand upon you for fully certified sales statements, and for the additional sums due as shown by such statements.

If these are not forthcoming, properly made up, showing your sales by departments for the periods in question, on or before May 1st, next, we will turn the matter over to our attorneys with instructions to them to ask the courts to terminate your lease. [356]

Very truly yours,

McNAIR REALTY COMPANY.

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#### Recross-Examination

By Mr. Williams:

Q. You have just stated that you obtained the figure of \$88,000 as the approximate amount of the total wholesales; that figure was obtained from the books of the Gamble-Skogmo Company, was it not? A. These books, yes. [358]

A. And by these books you are pointing to the books that are the sales records of the Gamble department store? A. Yes.

Mr. Hall: I think we call those store records; at least what I have been calling them.

Mr. Williams: Very well.

Q. Now I believe you testified once before that you are not familiar with the bookeeping setup of the Great Falls Gambles department store, is that correct? A. That is correct.

(Testimony of Chester McNair.)

Q. And these wholesale sales as far as you know could be wholesale sales to employees, could they not?

A. There is a space there for sales to employees and these were in a space marked wholesale sales.

Q. The space marked—I will hand you these books which you purported to take this figure from, and do you see any place that states sales to employees?

A. This provides for employees discount.

Q. There is a figure there for provision for employees discount, isn't there?

A. There is.

Q. Is there any figure which provides for sales to employees or any account of sales to employees?

A. It was explained to us by—

Q. Just answer the question.

A. Well I can't see it. I can't see it. [359]

Q. Now it is possible, is it not, that an employees discount does not amount to the full value of the merchandise? A. That is correct.

Q. In other words, Gambles is not giving their merchandise to their employees?

A. That is correct.

Q. And as far as you know the figure which would be the employees discount would be a percentage of the total purchase price to the employer?

A. Well I don't know their methods. I don't know what it would be.

Q. Now do these figures and these books from which you purported to take the total figure for

(Testimony of Chester McNair.)

wholesale sales, does that show any sales or transfers to other Gambles stores?

A. I don't know. As a matter of fact I didn't take those figures myself.

Q. Well you have these books in front of you, which are the store records, do you see any figure there which purports to be sales or transfers to other Gambles stores? A. No.

Q. Then so far as you know the figure shown on these store records as wholesale sales could be sales or transfers of merchandise to other Gambles stores? A. It could be sales to anybody.

Q. That item of sales and transfers of merchandise to other Gambles stores is not shown elsewhere in these records, [360] is it?

A. Well—which?

Q. The items of sales and transfers to other Gambles stores?

A. Well I haven't seen it, no.

Q. Now I believe you testified a few minutes ago that you told your brother that you had entered into a new lease and you gave him the details of the same, is that correct?

A. Details of the lease.

Q. Yes. Is it your contention and was it your understanding at that time that the new lease had been negotiated?

A. It was my understanding subject to one provision which was to get confirmation.

Q. And that provision was one which could amount to the sum of \$3,000.00 a year, could it not?

(Testimony of Chester McNair.)

A. Yes.

Q. That provision was as to whether the minimum rental payments on a yearly basis would be \$15,000.00 per year or \$12,000.00 per year?

A. No, that provision was whether the minimum rental would be \$12,000.00 a year or some lesser figure; whether \$12,000.00 a year would be acceptable to Gamble-Skogmo.

Q. At any rate the figure of \$12,000.00 a year had not been settled upon?

A. That figure was subject to confirmation by Minneapolis; it had been accepted by Mr. [361] Hill.

\* \* \*

Q. I believe you stated a few minutes ago that there was an agreement on behalf of the plaintiff to pay the defendant the sum of \$5,161.60; you stated that that was more than a tacit agreement, it was an actual agreement?

A. That was my understanding. [362]

Q. When was that figure accepted, that offer to pay accepted by you?

A. It was understood between us that we wouldn't talk about a new lease until that was cleared up.

Q. Then that figure was accepted by you before there was any talk about a lease?

A. My understanding.

Q. At any rate it was accepted by you prior to October 27th, 1949, was it not? A. Yes.

(Testimony of Chester McNair.)

Q. At any time on the date of October 27th, 1949, did you refuse to accept that figure?

A. Only unless it had strings.

Q. Only what?

A. Only in case it had strings attached. [363]

\* \* \*

BEN P. MCNAIR, JR.

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hall: [364]

\* \* \*

Q. Now from time to time have you had occasion to go into the Gamble store here in Great Falls? A. Yes.

Q. During the period of the December 27th, 1943, lease? A. Yes.

Q. What about how many occasions have you been in there?

A. I have been there several times a year.

Q. I am not trying to pin you down to any particular number, and upon any of those occasions did you see any farm machinery being displayed in the Gamble store? A. Yes.

Q. And what sort of farm machinery was being displayed?

A. I saw at one time a tractor. [365]

\* \* \*

(Testimony of Ben P. McNair, Jr.)

Mr. Williams: We offer in evidence Plaintiff's Exhibit 17.

Mr. Hall: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 17, offered and received in evidence, is in words and figures as follows, to wit:) [366]

### PLAINTIFF'S EXHIBIT No. 17

C. S. McNair

B. P. McNair

W. Robt. Gilchrist, Manager

Established 1893

B P. McNair Company

Insurance in All Lines

Real Estate, Loans and Rentals

First National Bank Building

Phone 2-1094

Great Falls, Montana

September 6, 1945

Gamble-Skogmo, Inc.

700 Washington Avenue North,

Minneapolis, Minnesota.

Attention: Mr. Ken Watters.

Dear Ken:

This week completed the deal whereby we purchased the lot and warehouse in back of the property you people rent from us. The warehouse is vacant and is now available for you to occupy. It is my understanding that you and Chester agreed

(Testimony of Ben P. McNair, Jr.)  
on a \$60.00 per month rental. This would be an entirely separate rent deal than the rent on the store.

I went over to see your manager the other day to tell him he could occupy the warehouse and he was not in so I talked with the assistant manager who said he [367] had no authority to take over the warehouse although he knew Gambles wanted it. Will you please instruct your Great Falls manager that he may occupy the premises.

Some time ago we submitted several proposals to Mr. Peters for the garage building and to date we have not heard from him although he said he would definitely be interested in one of the deals we proposed.

The Tent and Awning Company who occupy the store on the alley are very insistent that we give them another lease, however, we are stalling them and we would like to know definitely from you if you want the premises now occupied by them, the shoe repair shop and also the garage building.

With best personal regards to all the boys at Gambles from Chester and myself.

Sincerely,

B. P. MCNAIR COMPANY,

By /s/ BEN,

B. P. MCNAIR.

ew/

Mr. Williams: That is all.

Mr. Hall: That is all. [368]

S. L. HJERMSTAD

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hall:

Q. Your name is S. L. Hjermstad?

A. That is right.

Q. And you are in the insurance business here in Great Falls, are you not? A. Yes, sir.

Q. And how long have you lived here?

A. I took charge of this territory February 1st, 1944.

Q. And have you lived here since?

A. Yes.

Q. Were you living here in the year 1947?

A. Yes.

Q. Are you acquainted with the location of the Gambles store on Central Avenue? A. I am.

Q. At 521, 523, 525? A. I am.

Q. That is its present location? A. Yes.

Q. Have you had occasion to go into the Gamble store in 1945, 1947, 1948 and 1949?

A. Yes, sir.

Q. And for what purpose?

A. To check the insurance rates for the engineering department of the companies carrying that schedule.

Q. What insurance company do you represent?

(Testimony of S.L. Hjermstad.)

A. Well, I am State Agent for the American Four Group.

Q. Yes, that is several insurance companies?

A. Yes, several insurance companies and one casualty [369] company.

Q. Now on occasion when you were in the Gambles store did you see any farm machinery displayed there?

A. I saw a tractor the last inspection or next to the last.

Q. And what year would that be?

A. If I remember correctly that was in 1947.

Q. And in what part of the store was it displayed?

A. About in the center of the main floor as you come in.

Q. That is the street floor? A. Yes.

Q. What sort of tractor was it?

A. Well, the first reaction was this——

Q. What sort of tractor was it?

A. Farm tractor.

Q. What size?

A. Well, I would say it was a medium size a farmer would buy without going into the large tractor-type tractors.

Q. And did you see any farm machinery displayed there on more than one occasion?

A. Not prior to that time.

Q. Did you see any thereafter?

A. No, I did not.

(Testimony of S.L. Hjermstad.)

Mr. Hall: You may cross-examine. [370]

\* \* \*

Mr. Hall: The defendant rests, your [371] Honor.

\* \* \*

### DALE COCKAYNE

resumed the stand for plaintiff, and testified as follows:

#### Direct Examination

By Mr. Williams:

Q. Mr. Cockayne, are you the same Dale Cockayne who has testified previously on two occasions in this trial? A. Yes, sir.

Q. And you are the manager of the Gambles store here in Great Falls, are you not?

A. Yes, sir.

Q. Has the Gambles store in Great Falls ever developed a general wholesale business on the premises known as 521, 523, 525 Central Avenue? [372]

Mr. Hall: Objected to as calling for a conclusion of the witness.

The Court: Sometimes a conclusion is better than to take five or ten minutes to elaborate and go into details and qualify the witness. I will let him answer the question.

A. No, sir, we have not.

Q. Your store records are in evidence here and there are certain figures on those store records which purport to be wholesale sales. I am now handing you Defendant's Exhibit No. 27 and will

(Testimony of Dale Cockayne.)

you tell the court what the nature of those sales which purport to be wholesale sales are on the store records?

A. Those are sales to Gambles stores.

Q. During the time that you have been manager of the Great Falls Gambles store has that store ever made one sale to any person on a wholesale basis which was not another Gambles store?

A. Yes, we have but it would not show up in that column on the statement. We would take a mark down on the merchandise and it would appear as regular retail sale as far as the statement is concerned.

Q. Now you are talking about a mark down sale, are you not? A. Yes, sir.

Q. I am asking you if you have ever made a wholesale sale [373] during the time that you have been manager to anyone other than another Gamble store? A. No, sir, we have not.

Q. Now I believe that sometime during the year 1948 Mr. Chester McNair asked you for some information relating to sales figures, is that correct?

A. That is correct.

Q. And did you give him those sales figures?

A. Yes, sir, I did.

Q. Since that time has he ever asked you for any sales figures?

A. I believe one other time.

Q. And did you give him the figures the other time? A. Yes, sir, I did.

Q. Has any representative from the defendant

(Testimony of Dale Cockayne.)

ever made a request to examine your sales records prior to October 3rd, 1949?

A. Just that one time and they were given them.

Q. And you state that one time there was a request and it was granted?

A. Yes, sir, that is true.

Q. Has there ever been a writing served on you requesting or demanding access to your sales records? A. No, sir, there has not.

Q. What were your general relations with Mr. Chester McNair and Mr. Ben McNair? [374]

A. As far as myself is concerned they were always very good I thought.

Q. And if they had requested or demanded access to the books, would you have granted that access? A. Yes, sir, I would have.

Q. Do you know if the plaintiff has a company policy of granting or denying access of the books to the landlord? A. Yes, they have.

Q. And what is that policy?

A. To let them see them if they so desire.

Q. At any time have you ever refused to let the defendant or any of its officers inspect your sales records? A. No, sir, I have not.

Q. At any time have you ever refused to let the defendant or any of its representatives have whatever files they want or wholesale sales or farm store sales or other sales?

A. No, sir, I have not. [375]

(Testimony of Dale Cockayne.)

Cross-Examination

\* \* \*

By Mr. Hall:

Q. Now you told Mr. Williams on direct examination about these, this wholesale business as shown by the store records, and I believe your testimony is that the store records so far as wholesale sales are concerned reflect sales to other Gamble stores? A. Yes, that is true.

Q. And I believe you told me on cross-examination the other day that the Gambles stores that you had reference to were the stores in the smaller towns? A. That is true.

Q. Operated by individuals are not affiliated at all with Gamble-Skogmo?

A. Well they are affiliated to the point that they are under contract, Mr. Hall.

Q. Well what is that?

A. It is an associated store. [377]

Q. Well, by associated store you mean, do you not— A. Franchise store.

Q. They are permitted to use the name Gamble?

A. Yes, sir.

Q. Is there any other name attached to that?

A. No, sir.

Q. And the fact of the matter is that Gamble-Skogmo has no interest in that store, has it?

A. That is a pretty hard question to answer. We have no dollar and cent interest, no.

Q. I didn't hear you?

A. We have no dollar and cent interest.

(Testimony of Dale Cockayne.)

- Q. No financial stake in any of those stores?
- A. Some we do have where we have trust notes.
- Q. That would be in cases where you would loan them money to set them up in business?
- A. Yes, sir.
- Q. But, as I understood you in your other examination, the wholesale figures shown upon these store records do not include any sales made to regular Gambles stores such as we have in Billings and Havre and perhaps—is that all you have?
- A. Let's use the term branch stores.
- Q. Branch stores?
- A. Yes, that is true. [378]
- Q. There's the three of them?
- A. There's two types of stores, branch store and a dealer store.
- Q. And you are branch stores?
- A. Yes, sir.
- Q. Owned directly by Gamble-Skogmo?
- A. Yes.
- Q. And located in Great Falls, Havre and Billings? A. Yes, sir.
- Q. And other stores are all franchise stores or dealer stores?
- A. Most of them. We have stores in Missoula, Kalispell, Glendive, Miles City and Glasgow; outside of those it would be a dealer store, yes.
- Q. But none of those branch stores sales and transfers or merchandise to the branch stores do not show in your store records as wholesale sales?
- A. Absolutely right.

(Testimony of Dale Cockayne.)

Q. All the accountings that were made under the lease of December 27, 1943, and all of the letters of transmittal of checks for rent under that lease originated out of Minneapolis, did they not?

A. Yes, sir.

Q. You don't pay the rent here at Great Falls?

A. No, sir.

Q. Nor do you yourself prepare those accountings upon which the rent is based?

A. They are prepared—we cause them to be prepared. We [379] don't make that statement here in Great Falls, no, sir.

Q. I understand that but presumably at least the data supplied by your store after going through several hands forms the basis for the accountings made by the Minneapolis office? A. Yes, sir.

Q. Or at least then paid? A. Yes, sir.

Mr. Hall: I think that is all.

#### Redirect Examination

By Mr. Williams:

Q. I believe you stated that the dealer stores are also called Gamble stores and that they have, and that there is a contract between them and Gamble-Skogmo, Inc.? A. Yes, sir.

Q. In general without giving the details what does that contract cover?

A. Well the purchase of our goods, the purchase of goods mainly and supervision and so forth along that line.

(Testimony of Dale Cockayne.)

Q. In other words, they purchase Gamble's products?

A. Yes, sir, and services and so on and so forth.

Q. Do they have priority on purchasing Gamble products?

A. Yes, I would say that they do have.

Q. Are they entitled to purchase Gambles products at wholesale prices? A. Yes, sir. [380]

Q. And is that a cost price without profit to the Gamble branch store?

A. The way a branch store has to handle it it is.

Q. Does this particular Great Falls department store make a profit on these transfers of merchandise to other Gambles stores?

A. No, you lose money on it.

Q. And by that you refer to the transfer of merchandise or the sale of merchandise to the dealer stores?

A. That is right. If you were equipped as a warehouse as the warehouses are equipped it is a profitable business but you can't make money on it doing retail business.

Mr. Williams: That is all.

#### Recross-Examination

By Mr. Hall:

Q. The local store may lose money, Mr. Cockayne, but Gamble-Skogmo makes money on the transaction, does it not? A. No.

Q. I say they make no money then as far as dealer stores are concerned?

(Testimony of Dale Cockayne.)

A. Not if they purchase their merchandise through branch stores they wouldn't, Mr. Hall.

Q. The merchandise that is delivered to the dealer stores [381] by you comes off of your shelves, does it not? A. Yes, sir.

Q. And the goods are paid for to you?

A. Yes, sir.

Q. By the dealers? A. Yes, sir.

Q. And are reflected in your wholesale items and in the store records?

A. Yes, sir, that is true.

Mr. Hall: That is all.

Mr. Williams: That is all.

Mr. Williams: Call Mr. William Hill.

### WILLIAM T. HILL

resumed the stand and testified as follows:

#### Direct Examination

By Mr. Williams:

Q. What is your name?

A. William T. Hill.

Q. Are you the same William T. Hill who previously appeared as a witness in this action?

A. Yes, sir.

Q. I believe you testified that you are in charge of the lease department of the plaintiff; is that right? A. Yes, sir.

Q. As such do you have access to the records of the headquarters office in Minneapolis?

A. Yes, sir. [382]

(Testimony of William T. Hill.)

Q. Do those records show where the Great Falls department store has developed a general wholesale business?

Mr. Hall: Where are the records?

Mr. Williams: Is that an objection?

Mr. Hall: Yes, I am going to object to it as not the best evidence. You are asking, as I understand it, something about records.

The Court: Yes, the records in reference to it should be available for examination.

Q. (By Mr. Williams): Mr. Hill, are you familiar with the system of accounting used by the Great Falls Gambles store? A. Partially.

Q. I hand you this record marked Defendant's Exhibit 27. Are you familiar with that record and the way it is obtained? A. Yes, sir.

Q. That record is obtained in the normal course of business of the plaintiff, is it not?

A. That is correct, yes, sir.

Q. Do those records disclose whether or not the plaintiff has developed a general wholesale business in Great Falls, Montana?

A. Well, they indicate it is not a general wholesale business.

Q. As manager of the lease department you carry on most [383] of the correspondence with the landlords, do you not? A. That is correct.

Q. Prior to the date of October 3rd, 1949, has there ever been a demand made upon your department or upon the plaintiff by the defendant to have access to the store records? A. No, sir.

(Testimony of William T. Hill.)

Q. Prior to October 3rd, 1949, was there ever a demand made by the defendant to the plaintiff that the records be audited? A. No, sir.

Q. Prior to the deposition of Mr. Cockayne, which was originally set for October 19th, 1949, was there ever any demand to have the books subpoenaed by the defendant? A. No, sir. [384]

\* \* \*

### Cross-Examination

By Mr. Hall:

Q. Was that policy ever communicated by you to Mr. McNair?

A. No, sir, it wasn't, Mr. Hall.

Q. Now I am not sure that I understand you when you say that no demand to have the books subpoenaed was ever made by the defendant; what do you mean by that?

A. Prior to October 3rd?

Q. Yes.

A. I already answered the question, Mr. Hall.

Q. What is that?

A. I already answered the question.

Q. And your answer was no such demand to have the books subpoenaed was made by the defendant? [385] A. Well, that is correct.

Q. Demand upon whom?

A. On the retail store.

Q. Subpoenaes are issued out of court, are they not? A. Correct.

(Testimony of William T. Hill.)

Q. What is it about these store records which you had examined in your direct examination that shows that Gambles has not developed a general wholesale business here?

A. By the figures which I have examined. The figures which I have examined.

Q. And do you mean by that the amounts?

A. The amounts.

Q. In other words, you figure that to develop a general wholesale business, something over \$40,000.00 a year should be developed?

A. Not necessarily.

Q. Well, what is the limitation?

A. We are not engaged in the wholesale business through our retail stores.

Q. But you looked into the record that Mr. Williams handed to you and said that the records disclosed that? A. That is correct.

Q. And I say, or what about that that discloses the fact to you?

A. Well, each operation is clearly defined by those records. [386]

\* \* \*

Mr. Williams: Plaintiff rests, your Honor.

Mr. Hall: Defendant rests.

Mr. Williams: At this time, on behalf of the plaintiff, we move the court for a judgment and entry of judgment for the plaintiff and against the defendant upon the grounds and for the reasons that the evidence and the law in this case justify

the plaintiff in having a judgment in accordance with the prayer of its complaint on file herein.

Mr. Hall: A similiar motion for the record is made on behalf of the defendant that the action be dismissed at [387] plaintiff's costs. [388]

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### CLERK'S CERTIFICATE

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 442 pages, numbered consecutively from 1 to 442, inclusive, constitutes a full, true and correct transcript of all portions of the record in case No. 1195, Gamble-Skogmo, Inc., a corporation, vs. McNair Realty Company, a corporation, designated by the parties as the record on appeal and on cross-appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that pursuant to the direction contained in Appellee's Designation of Contents of Record on Cross-Appeal, I transmit herewith, as a part of the record on appeal and cross-appeal, original Exhibits Nos. 8, 9, 10, 11, 12, 13, 14 and 15, which were offered by the defendant and received in evidence at the trial of said cause.

I further certify that the costs of said Transcript of Record on Appeal amount to the sum of Forty-nine and 30/100ths (\$49.30) Dollars, and that said costs have been paid by the parties as follows, to wit: the sum of \$31.70 by Appellant, McNair Realty Company, and the sum of \$17.60 by Appellee, Gamble-Skogmo, Inc.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of May, A.D. 1951.

[Seal]

H. H. WALKER,

Clerk as Aforesaid.

By /s/ C. G. KEGEL,

Deputy Clerk. [442]

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[Endorsed]: No. 12944. United States Court of Appeals for the Ninth Circuit. McNair Realty Company, a Corporation, Appellant, vs. Gamble-Skogmo, Inc., a Corporation, Appellee, vs. Gamble-Skogmo, Inc., a Corporation, Appellant, vs. McNair Realty Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed May 22, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12944

McNAIR REALTY COMPANY, a Corporation,  
Appellant and Cross-Appellee,

vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee and Cross-Appellant.

STATEMENT BY GAMBLE-SKOGMO, INC., A  
CORPORATION, OF POINTS ON APPEAL  
TO BE RELIED UPON BY APPELLEE  
AND APPELLANT ON CROSS-APPEAL

The Appellee and Appellant on Cross-Appeal above named, Gamble-Skogmo, Inc., a corporation, through its counsel of record, hereby adopts for its statement of points upon which it intends to rely upon this appeal, the Designation of Points to Be Relied Upon by Appellee and Appellant on Cross-Appeal heretofore, and on the 17th day of April, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon counsel for Appellant and Cross-Appellee, and certified by said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated June 1, 1951.

GAMBLE-SKOGMO, INC.,  
A Corporation,  
Appellee and Appellant on  
Cross-Appeal.

By /s/ I. W. CHURCH,  
/s/ G. G. HARRIS,  
/s/ BJARNE JOHNSON,  
/s/ CARTER WILLIAMS,  
Its Attorneys.

Service of Copy acknowledged.

[Endorsed]: Filed June 4, 1951.

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[Title of Court of Appeals and Cause.]

STATEMENT BY McNAIR REALTY COMPANY, A CORPORATION, OF POINTS ON APPEAL TO BE RELIED UPON BY APPELLANT

The Appellant above named, McNair Realty Company, a corporation, through its counsel of record, hereby adopts for its statement of points upon which it intends to rely upon this appeal, the statement of points to be relied upon by Appellant heretofore and on the 4th day of April, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon counsel for Appellee, and certified by said District Court

Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated June 1, 1951.

McNAIR REALTY COMPANY,  
A Corporation,  
Appellant.

By /s/ H. C. HALL,  
/s/ EDW. C. ALEXANDER,  
Its Attorneys.

Service of Copy acknowledged.

[Endorsed]: Filed June 4, 1951.

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[Title of Court of Appeals and Cause.]

STIPULATION OF PARTIES DESIGNATING  
PARTS OF RECORD TO BE PRINTED  
FOR USE ON APPEAL

It Is Hereby Stipulated, by and between the above-named parties, through their respective counsel, that the portions of the Record of the District Court of the United States for the District of Montana, in said cause heretofore designated by the respective parties, which designation and record have been heretofore certified to the Clerk of the United States Court of Appeals for the Ninth Circuit, are hereby designated as the portions of the

record which are material to the consideration by this Court of the appeal and cross-appeal herein, and as such shall be printed by the Clerk of this Court.

Dated June 1st, 1951.

McNAIR REALTY COMPANY,  
A Corporation,

By /s/ H. C. HALL,

/s/ EDW. C. ALEXANDER,  
Its Attorneys.

GAMBLE-SKOGMO, INC.,  
A Corporation,

By /s/ I. W. CHURCH,

/s/ G. G. HARRIS,

/s/ BJARNE JOHNSON, and

/s/ CARTER WILLIAMS,  
Its Attorneys.

[Endorsed]: Filed June 4, 1951.

No. 12944

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IN THE

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT COURT**

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McNAIR REALTY COMPANY, a Corporation,  
Appellant,  
vs.  
GAMBLE-SKOGMO, INC., a Corporation,  
Appellee.

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GAMBLE-SKOGMO, INC., a Corporation,  
Appellant,  
vs.  
McNAIR REALTY COMPANY, a Corporation,  
Appellee.

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**BRIEF OF APPELLANT, McNAIR REALTY COMPANY**

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Upon Appeal From the District Court of the United States  
for the District of Montana

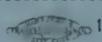
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Filed....., 1951.

Clerk.





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IN THE

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT COURT**

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McNAIR REALTY COMPANY, a Corporation,  
Appellant,  
vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee.

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GAMBLE-SKOGMO, INC., a Corporation,  
Appellant,  
vs.

McNAIR REALTY COMPANY, a Corporation,  
Appellee.

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**BRIEF OF APPELLANT, McNAIR REALTY COMPANY**

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**JURISDICTION**

*District Court:* The action is one for a declaratory judgment brought by Gamble-Skogmo, Inc., a Delaware Corporation, against McNair Realty Company, a Montana

Corporation. (R. p. 3). The District Court had jurisdiction under the provisions of 63 Stat. 105, Sec. 2201, Title 28, U. S. C. A. provided the amount in controversy exceeds \$3000.00. The complaint, (R. pp. 3-8), contains the following allegations:

- (a) "The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000.00)." (R. p. 3).
- (b) "The defendant claims that it is entitled to a rental of two per cent (2%) on all such sales and that, therefore, the plaintiff is indebted to the defendant for a sum of money in excess of Three Thousand Dollars (\$3000.00), exclusive of interest and costs, although the exact sum claimed by the defendant is not known to the plaintiff." (R. p. 5).
- (c) "The right of the plaintiff to continue and remain in possession of the above described demised premises under said written lease is of great value to the plaintiff, namely, of the value of over Three Thousand Dollars (\$3000.00)." (R. p. 7).

By its complaint Appellee, Gamble-Skogmo, Inc., seeks a declaratory judgment with respect to a certain written lease, (R. pp. 9-23), whereunder it, as the tenant of McNair Realty Company, occupied certain store premises in Great Falls, Montana. The relief sought is as follows, (R. pp. 7, 8):

"Wherefore, plaintiff, as a party interested under said written lease of December 27, 1943, prays this Court for a declaration of the rights and duties of the parties hereto under said written lease and the facts hereinabove set forth:

- (a) As to whether the plaintiff owes the defendant any sum of money as rental;
- (b) As to whether or not the plaintiff is in default of any of the covenants contained in said written lease;

(c) As to whether the said written lease is terminated and forfeited;

(d) As to whether the defendant is entitled to immediate possession of the said demised premises;

(e) As to the relationship under which the plaintiff now occupies said demised premises and the correct rental therefor."

The proof discloses, (R. pp. 93, 199), that the total delinquent rental claimed by the defendant was in excess of \$5000.00. Even though the value of the lease to Appellee is not disclosed by the evidence, (S. S. Kresge Co. v. Godfried, 59 Fed. Supp. 843), it would appear that the amount involved is sufficient to confer jurisdiction upon the District Court.

*Court of Appeals:* The lower court's decision was rendered on February 15th, 1951. (R. p. 44). Findings of Fact and Conclusions of Law were made on February 24th, 1951. (R. p. 57). Judgment was entered on March 14th, 1951. (R. p. 60). Notice of Appeal was filed April 2nd, 1951 with proper Undertaking on Appeal. (R. pp. 60-62). The judgment made and entered on March 14th, 1951 was a final judgment and thus appealable to this Court. (Kasishke v. Baker, CAC. Okla. 144 Fed. (2d) 384). The appeal and record were docketed on May 22nd, 1951. (R. p. 370). The delay was occasioned by the cross appeal filed by Gamble-Skogmo, Inc. on April 13th, 1951. (R. pp. 63, 64). It is evident, therefore, that this Court has jurisdiction of the appeal.

I.

STATEMENT OF THE CASE

It appears from the complaint, (R. pp. 3-8), and the

answer, (R. pp. 25-32), that on December 27th, 1943 the McNair Realty Company and Gamble-Skogmo, Inc. entered into a written lease covering a store building and basement known as 521-523-525 Central Avenue in Great Falls, Montana. The lease is attached as Exhibit "A" to the complaint. (R. pp. 9-22). The lease provided for a yearly base rental of \$5400.00 per year plus a percentage rental based upon 2% "on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) per lease year, had and obtained on the above described premises." (R. p. 10). The lease also contained the following provisions which are important here:

- (a) "Time is the essence of this lease and all the provisions hereof." (R. p. 10).
- (b) The additional percentage rental "is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for." (R. p. 11).
- (c) "If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor's election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to reposess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears

of rent or preceding breach of covenants." (R. p. 19).

The Appellee, Gamble-Skogmo, Inc., took possession of the premises under the lease, and thereafter "made certain net retail sales of farm equipment" upon which the Appellant, McNair Realty Company, claims the percentage rental should apply. (R. pp. 4, 5).

On October 3rd, 1949 McNair Realty Company gave notice to Appellee of the termination of the lease. This notice is attached to the complaint as Exhibit "B", (R. pp. 23, 24), and is as follows:

"October 3, 1949

"Gamble-Skogmo, Inc.,  
700 Washington Avenue North,  
Minneapolis, Minnesota.

Gentlemen:

McNair Realty Co. of this City has turned over to us for our attention the controversy which has existed for several months between you and the McNair Realty Co. concerning rents payable under your lease dated December 27, 1943. The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated. In the immediate future, without further notice, McNair Realty Co. will re-enter the premises pursuant to paragraph 16 for the purpose of remodeling the same for rental to others. Action for rentals due will thereafter be filed. Please govern yourself accordingly."

On October 10th, 1949 demand was made upon the manager for the immediate possession of the premises.

(R. p. 6). Later the Appellee was notified in writing that "commencing October 3rd, 1949 your occupancy of the premises at 523 Central Avenue will be from day to day at the rate of \$300.00 per day until McNair Realty Company has regained possession." (R. pp. 6, 25).

By its complaint, based upon the above facts, the Appellee advances the following claim:

(a) That the farm sales were not "had and obtained" on the demised premises. (R. pp. 4, 5), and that Appellee was not required to account for or pay a percentage upon such sales.

(b) That if plaintiff "has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists." (R. p. 6).

(c) That the lease has not terminated and Appellant is not entitled to possession of the premises, and that the daily rental of \$300.00 per day "is unjust, unreasonable, and has not been agreed upon by the parties." (R. p. 7).

The claims made as above on behalf of the Appellee were met by denials and allegations contained in Appellant's Answer, which, so far as important here, are as follows, (R. pp. 27, 28, 29):

"Denies that said plaintiff duly or otherwise performed all of the covenants in said lease binding upon it, and in this behalf defendant alleges that plaintiff failed, refused and neglected to make and deliver to defendant a full, true or correct accounting, quarterly or otherwise or at all, covering the net retail sales or general wholesale business done by plaintiff as provided for in said lease, although such accounting was many times demanded by defendant. Instead, over the written and oral protests of defendant, plaintiff furnished to

defendant false, incomplete and incorrect so-called quarterly accountings of such sales which were, from time to time, rejected by defendant. By reason of such arbitrary and unreasonable breach by plaintiff of the terms and covenants of said lease on its part to be performed, defendant was unable to ascertain the true and correct amount of rental to be paid by plaintiff under the terms of said lease until the 24th day of October, 1949, upon which date the deposition of Dale Cockayne, manager for plaintiff of plaintiff's Great Falls store, was taken and his testimony perpetuated under the provisions of Sections 10687 to 10692 of the Revised Codes of Montana, 1935. By the testimony of said Cockayne, and the records of plaintiff introduced in evidence as a part of said deposition, it was disclosed that plaintiff was indebted to defendant for rental for the period 1947, 1948 and 1949 to October 19, 1949, in a sum in excess of \$5,161.00. Defendant admits that subsequent to March 1, 1944, and particularly during the years 1947, 1948 and 1949 plaintiff made net retail sales of farm equipment and other items, but specifically denies that said sales were had and obtained elsewhere than on the premises described in said lease, and in this behalf defendant alleges that said farm equipment and other items were advertised for sale by Gambles Store located upon said premises; the greater part of the sales of such equipment and items were initiated and consummated on said premises; all sales slips, contracts and moneys were handled by the business office located in said premises; all sales were made under the supervision of the manager of said store; and, said farm equipment and other items was treated and considered by plaintiff as a unit or department of its store located upon said premises, all as shown and disclosed by the records of plaintiff introduced in evidence in the deposition of Dale Cockayne, aforesaid. Admits that defendant claimed and now claims that it is entitled to an additional rental by reason of such sales, and that, therefore plaintiff is indebted to the defendant in a sum of money in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs. Denies that the exact sum claimed by defendant

is not known to plaintiff. Specifically denies that plaintiff denies such claim of defendant, or that plaintiff contends that said sales of farm equipment and other items were not within the provisions of paragraph 2 of said lease, and in this behalf defendant alleges that on or about the 24th day of October, 1949, the said plaintiff offered to pay to said defendant the sum of \$5,161.60 as and for additional rental due defendant by reason of retail sales of such farm equipment and other items, which offer was by said defendant accepted, and that no controversy now exists or existed at the time of the filing of plaintiff's complaint with respect to such matter. Said sum of \$5,161.60 has not been paid by plaintiff to defendant."

With issue thus joined, it was apparent that the principal questions were: (1) Did the Appellee make full and complete accountings quarterly to Appellant for all net retail sales, including sale of farm equipment; and, (2) did the Appellee pay to the Appellant the rental to which it was entitled under the lease?

The lower Court disposed of those questions in its opinion as follows, (R. pp. 34-36):

"However, there were certain sales of farm implements and equipment made by lessee upon which the two per cent rental payment was never made, and which lessor claims were improperly withheld in violation of the express terms of the lease, and this affords the principal cause of contention in this suit. The lessee asserts that the sales of farm implements and equipment were conducted from a building across the alley and on a separate lot from the department store on Central Avenue, and was established as a separate and distinct business that was not in contemplation by the parties at the time the lease was executed and constituted no part of the rental agreement and therefore could not be included in the net retail sales to which the percentage clause applied. The lessor claims that all such retail sales were

'had and obtained on the above-described premises,' according to the evidence and terms of the lease, and the argument advanced in support of this contention in general is that the only Gamble Store operated in Great Falls was the department store at 521-523-525 Central Avenue and was conducted by one manager, who had charge of unit No. 5 of the store for sale of farm equipment, all advertising, display in store, approved credit sales and received all money. From the department store customers were taken to the place or places of storage of farm equipment, except when such implements or equipment were on display in the store, and in furtherance of the claim that sales made of farm implements and equipment were as much 'had and obtained' upon the premises at the above numbers as any other sales made in the usual course of business, counsel for lessor has submitted a clear and succinct statement of the evidence in his brief which lends support to his argument. The evidence as shown by the statement referred to and by the transcript is so plain and convincing that there seems to be no question how and where the sales and disposition of agricultural implements and accessories were 'had and obtained.'

"Although counsel argue that farm equipment sales were not in contemplation at the time the lease was signed, there seems to be no point to that argument; the parties agreed to a percentage rental on all retail sales above \$270,000.00; there was no specification of sales of any particular kind or description of property sold, or to be sold, to which the rent would apply apart from the general provision. Without further discussion of this subject the court is of the opinion that there should have been included in computing the 2% on all retail sales over \$270,000.00 the amount of sales of farm implements and accessories; and to that extent the plaintiff would be indebted to defendant for additional rental."

By its Findings of Fact and Conclusions of Law and

Judgment, (R. pp. 44-60), the court again disposed of such questions.

With the Findings of Fact, Conclusions of Law, and Judgment above quoted the Appellant finds no fault and claims no error upon this appeal. However, after determining the default of the Appellee in respect to accounting and payment of rental, the Court went further with respect to the right of Appellant to terminate the lease and take possession of the premises. In Findings of Fact X, XI and XII, the Court found as follows, (R. pp. 54, 55) :

“X.

“In its Complaint herein the plaintiff alleges that ‘the plaintiff is ready, willing and able to make full compensation to the defendant’ for its default in the payment of rent, if any such default be found by the Court, and, plaintiff through its agent, at the trial of the action, agreed that the plaintiff was ‘ready, willing and able to make full compensation for that rent with interest, costs and damages’ in the event that this Court decided that plaintiff was in default.”

“XI.

“By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereafter set forth.”

“XII.

“The amount of compensation to be paid by plaintiff to defendant shall be as follows: The sum of \$5,931.18 principal and interest, constituting the rental due defendant as herein set forth with interest thereon at 6% per annum, together with interest on said sum at 6%

per annum until paid; the further sum of \$362.25 taxed as costs in this case with interest thereon at 6% per annum until paid. The Court further finds that by reason of the filing of this action and the trial thereof the defendant was required to and did procure the services of attorneys, and is obligated to compensate such attorneys for their services."

The lower Court then concluded, (R. pp. 56, 57) as follows:

"III.

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court and that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease, unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein."

"V.

"Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period,"

and decreed by its judgment, (R. p. 59), that:

" \* \* \* by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to,

and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease \* \* \*.”

It is with reference to this portion of the Findings, Conclusions and Judgment that the Appellant, McNair Realty Company, asserts error. The only possible basis for granting the Appellee such relief is found in paragraph V of the Complaint, (R. p. 6), in which the Appellee asserts:

“The Plaintiff further contends that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease, such failure was the result only of a honest and reasonable interpretation of said written lease, and the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists,”

and in the testimony of an employee of Appellee at the trial, (R. pp. 178, 179):

“Q. Now, if this court or another court of competent jurisdiction decides that you owe, that Gamble-Skogmo, Inc., owes the defendant McNair Realty Company some back rent, is the plaintiff Gamble-Skogmo, Inc., ready, willing and able to make full compensation for that rent with interest, costs and damages?

“A. Yes, sir, Gamble-Skogmo are ready and willing to compensate in the event the court decides.

“Q. In full?

“A. In full.

“Q. And that compensation would include rent, interest, costs and damages, would it?

“A. Correct, yes, sir.

“Q. Is this in any way an admission that the plaintiff Gamble-Skogmo, Inc., now owes the defendant any sum of money for rental or damages?

"A. No, sir."

Opposed to these affirmations of good faith and a willingness to pay we find, first, a willful refusal to either account for or pay the additional rental after repeated demands made by the Appellant over a long period of time. (Defendant's Exhibits 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 267, 268, 269, 270, 273, 280; Exhibit 26, R. pp. 348, 349); second, a statement in the complaint filed by Appellee that "the exact sum claimed by the defendant is not known to the plaintiff," (R. p. 5); third, an absolute refusal to pay or tender any sum until the Court decided against its contentions.

It will, therefore, be the contention of the Appellant herein that the Court erred, under the pleadings and the evidence, in granting to the Appellee relief from a termination of the lease.

## II.

### SPECIFICATIONS OF ERROR RELIED UPON

1. The lower Court erred in making Finding of Fact Numbered XI, as follows, (R. pp. 54, 55):

"By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time herein-after set forth,"

in that:

(a) By Finding of Fact Numbered VII the lower Court found that "plaintiff was in default in the payment of rent reserved for more than two consecutive rental

periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason of such default said lease was on October 3rd, 1949, and has been at all times since, subject to termination by defendant." (R. pp. 53, 54).

(b) By Finding of Fact Numbered IX the lower Court found that the defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof. (R. p. 54).

(c) At no time prior to March 6th, 1951, (R. p. 66) did the Appellee pay or tender to the Appellant or pay into Court any sum of money as rental or compensation due the Appellant in or to be relieved of a termination or forfeiture of the lease.

(d) The refusal of Appellee to either account to Appellant or to pay the additional rental due was willful and grossly negligent.

(e) The Finding is directly contrary to the express provisions of the lease prepared by Appellee and relied upon by it, wherein it is provided that, "Time is the essence of this lease and all the provisions hereof," and that upon default it shall be lawful for the Appellant to terminate the lease. (R. pp. 10, 19).

2. The lower Court erred in making Conclusion of Law Numbered III, (R. p. 56) as follows:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession

of the premises described in said lease, unless the plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for plaintiff of the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein."

in that:

(a) Said Conclusion is contrary to Findings of Fact Numbered VII, VIII and IX. (R. pp. 53, 54).

(b) Said Conclusion is contrary to Conclusion Numbered II. (R. p. 56).

(c) The lower Court was without jurisdiction in this proceeding to relieve the Appellee from a termination of the lease which had been properly and legally effected by the action of the Appellant on October 3rd, 1949. (Findings of Fact, VIII and IX, R. p. 54).

3. The lower Court erred in decreeing, adjudging and declaring "that by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease;" (R. p. 59), in that:

(a) This portion of the judgment is contrary to para-

graphs 1 and 2 of said judgment which are as follows, (R. pp. 58, 59):

“1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947 to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.

“2. By reason of such defaults the defendant was entitled, under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949.”

(b) The lower Court was without jurisdiction to relieve from a termination of the lease which had been properly and legally effected on October 3rd, 1949.

(c) This portion of the judgment is contrary to the express agreement of the parties as set forth in the lease prepared by and relied upon by Appellee.

(d) The lower Court was without jurisdiction to relieve the Appellee, in this action, from a termination of the lease incurred by reason of a breach of covenant to account as well as a breach of agreement to pay rent.

(e) The refusal of the Appellee to either account or pay additional rent was willful and grossly negligent.

(f) This portion of the judgment is contrary to Findings of Fact Numbered VII, VIII and IX, (R. pp. 53, 54) and to Conclusion of Law Numbered III, (R. p. 56).

III.

SUMMARY OF ARGUMENT

A. The lease here involved was prepared by the Appellee upon its own form and expressly provides:

“Time is of the essence of this lease and all the provisions hereof.”

“If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor’s election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants.”

B. In this action the lower Court had jurisdiction only to adjudge and declare that there had been a breach of and default in the terms and covenants of the lease by the Appellee and a proper termination of the lease by reason thereof, and it could not then convert itself into a court of equity and relieve from a termination which had been already properly and legally effected.

C. The covenants of the lease which were breached by the Appellee were not such as could be compensated for by the payment of delinquent rental and interest.

D. There was no tender of delinquent rental or offer to account to Appellant prior to the commencement of the action, nor at any time prior to the entry of the Findings

of Fact and Conclusions of Law, and Appellee may not, therefore, claim relief in equity.

E. The refusal of the Appellee to either account to Appellant or to pay the rental due for a period of three years was willful, fraudulent and grossly negligent.

#### IV.

### ARGUMENT

#### *A. The Provisions of the Lease.*

The lease here involved was prepared by Gamble-Skogmo, upon its own printed form. (R. pp. 76, 77). Among its various provisions are the following:

“Time is the essence of this lease and all the provisions hereof.” (R. p. 10).

“If default be made by the Lessee in the payment of the rent herein reserved for two consecutive rental periods, or in any of the covenants and agreements herein contained to be kept by the Lessee, it shall be lawful for the Lessor at the Lessor’s election at any time thereafter while such default continues, to declare said term ended, and to re-enter said demised premises, or any part thereof either with or without process of law, and to expel, remove and put out the said Lessee or any person or persons occupying the same, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants.”

In passing it is interesting to note also that by various provisions of the lease the Appellee is given the right to terminate the lease (a) for a failure to repair, (R. p. 13); for partial destruction of the premises by fire, (R. p. 16); by reason of the enactment of anti-chain store legislation,

(R. pp. 19, 20); or just because it so desires, (R. pp. 20, 21).

It is the rule in Montana that, while forfeitures are not favored, contracts making time of the essence thereof and providing for their termination on default are not contrary to law or public policy, and courts will not undertake to make new contracts for the parties, but will enforce such provisions in a contract unless waived, or the party for whose benefit the provisions are inserted is estopped from asserting them, or performance has been prevented by circumstances sufficient to relieve the defaulting party from performance.

Huffine v. Lincoln,  
87 Mont. 267, 282, 287 Pac. 629;  
Fratt v. Daniels-Jones Co.,  
47 Mont. 487, 133 Pac. 700;  
Edwards v. Muri,  
73 Mont. 339, 237 Pac. 209.

This is but a statement in different words of the rule which has long prevailed in equity. Thus in 30 C. J. S., p. 395, it is said:

“The exercise of the jurisdiction to relieve against forfeitures demands in most cases the application of the equitable doctrine that time is not essential, and that a failure to perform within the appointed time may be relieved against where compensation may be made for the delay. However, except in so far as affected by equitable circumstances considered *infra subdivision c*, of this section relief will be denied where the time of performance is made essential by the express terms of the contract. . . .”

See:

Gas & Electric Securities Co. v. Traction Corp.,  
CCA., N. Y., 266 Fed. 625.

*B. The Power of the Lower Court in This Action.*

The action here is one for a declaratory judgment under the provisions of Section 2201, Title 28, U. S. C. A., (63 Stat. 105). This section provides:

“In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

There is here involved a written lease between the parties containing various provisions as to which the Appellee here desired an interpretation or declaration. The first of such provisions relates to the obligation of the Appellee to account for net retail sales made by Appellee and to pay to Appellant a percentage thereon. (R. pp. 10, 11). The controversy with respect to such provision of the lease revolves around net retail sales of farm equipment and machinery made by Appellee during the period commencing January 1st, 1947 and extending to December, 1949. (R. pp. 4, 5). The second of such provisions relates to the right of the Appellant to terminate the lease by reason of a default in the payment of rent or by reason of a default in the performance of the other covenants of the lease. (R. p. 19).

In its Findings of Fact the lower Court found as follows:

Finding No. V:

“The defendant, at all times has claimed that the plaintiff, under the terms of its lease, was required to

pay to defendant a 2% additional rental upon all net retail sales made as aforesaid by the farm unit or department of the 'Gamble's Store,' but the plaintiff has at all times denied such claim, and has at all times refused to account quarterly or otherwise to defendant for any retail sales made, as aforesaid, by said farm unit, and has at all times since January 1st, 1947, refused to pay, quarterly or otherwise, to defendant the 2% additional rental arising out of such retail sales."

Finding No. VII:

"By reason of the refusal of the plaintiff to account to defendant for such net retail sales of the farm department or to pay to defendant the additional rental due to defendant under the terms of the lease, arising out of such sales, said plaintiff breached the terms and provisions of such lease, and at the time of the filing of plaintiff's Complaint, and at the time of the trial of this action said plaintiff was in default in the payment of rent reserved for more than two consecutive rental periods, and was in default in its covenant and agreement to account to defendant quarterly for the net retail sales of the farm unit or department, and that by reason of such defaults said lease was on October 3rd, 1949, and has been at all times since, subject to termination by defendant."

Finding No. IX:

"The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof."

In its Conclusions of Law the lower Court said:

Conclusion No. 1:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is indebted to the defendant in the sum of \$5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, together with interest upon

such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of \$5,931.18.

Conclusion No. 2:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a corporation, is in default with respect to the covenants contained in said lease relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff."

Conclusion No. 3:

"The defendant, McNair Realty Company, a corporation, is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease. . . ."

In its judgment the lower Court adjudged, decreed and declared as follows, (R. pp. 58, 59):

"1. The plaintiff was, at the time of the filing of its Complaint herein, in default with respect to the covenants contained in the lease between plaintiff and defendant relating to the payment of rental and to the quarterly accounting required to be made by plaintiff to defendant covering net retail sales made by plaintiff for the period January 1st, 1947 to August 31st, 1949, and as of December 23rd, 1949, was indebted to defendant for unpaid rental in the sum of \$5,177.70.

"2. By reason of such defaults the defendant was entitled, under the terms of the lease, to declare the lease terminated on October 3rd, 1949, and was entitled to the possession of the leased premises on October 10th, 1949."

It is quite evident, therefore, that the Court interpreted the provisions of the lease against the contentions and claims of the Appellee; that the Appellee was in default

both in the payment of rent and the performance of other covenants of the lease; and, that the Appellant had legally and properly terminated the lease between the parties. On October 3rd, 1949, Appellant, through its attorneys gave written notice to the Appellee of the termination of the lease, in part as follows, (R. pp. 23, 24):

“The provisions of the lease are clear. According to such provisions, and, indeed, by your own admissions you have failed for the past year or more to pay the rental due or to make proper accounting to the McNair Realty Co. for sales made by you. Correspondence has availed nothing. We are, therefore, directed to advise you that, under paragraph 16 of the lease, the term thereof is hereby declared terminated.”

This notice was given more than a month and a half prior to the filing of the present action. Thus, under the Court's Findings of Fact, Conclusions of Law and Judgment, the lease was terminated prior to the filing of the action.

Some suggestion may be made in the answer brief of Appellee that in the notice of termination the amount of the delinquent rent was not stated. But this was a matter of which the Appellee had exclusive knowledge. Demand after demand had been made for an accounting of farm sales, each of which were either wholly ignored or refused. (See Exhibit 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 263, 265, 267, 268, 270, 273, 280; Exhibit 26, R. pp. 348, 349). It was, indeed, only after the store records had been subpoenaed into State Court and the deposition of Appellee's Manager taken that Appellant for the first time was able to calculate the delinquent rental due it. (Answer, R. pp. 27, 28; Evidence, R. pp. 296, 297).

Under such circumstances, it is the contention of the Appellant that when the lower Court adjudged and declared that the Appellee was in default and that the lease had been properly terminated it could not then turn itself into a court of equity and relieve the Appellee from a forfeiture which had taken place more than a month prior to the filing of the complaint.

It was, indeed, an anachronism for the lower Court to say to Appellee—you have been in default in performance since 1947; the Appellant has, before the action was commenced, rightfully terminated the lease and is entitled to possession; but, I will, if you make certain payments, reinstate the lease between you and the Appellant and you can remain in possession.

In Standard Brands v. Bryce, 1 Cal. (2d) 718, 37 Pac. (2d) 446, the Supreme Court of California said:

"When, as here, the cause of action has already accrued and the only question for determination is the ultimate liability of one party on account of consequential relief to which another is shown to be entitled, it has been held that the nature of the action is not a cause for declaratory relief, but is defined by the subject-matter of the accrued cause of action. See *In re Sterrett's Estate*, 300 P. 116, 150 A. 159, 162; *Kaaa v. Waiakea Mill Co.*, 29 Haw. 122, 127, 128; see, also, notes in 12 A. L. R. 74-76; 50 A. L. R. 43, 44; 68 A. L. R. 119."

See also:

Fritz v. Superior Court,  
18 Cal. App. (2d) 232, 63 Pac. (2d) 872.

From and after October 3rd, 1949, according to the Findings of Fact, Conclusions of Law and Judgment of the lower Court, the Appellee had no further rights, duties

or obligations under the lease which had been terminated. Appellee could have, at any time prior to October 3rd, 1949, brought this action for the purpose of ascertaining its duties and liabilities under the lease. That it should have done so is apparent. Having failed to act until the Appellant had acted and the lease was terminated the Appellee cannot now seek relief in a declaratory judgment action asking for an interpretation of the lease. When by a breach of the Appellee's obligations under the lease its rights and duties thereunder have become fixed according to the law and the contract between the parties, the court cannot, in this proceeding, restore the parties to a status quo ante and from that vantage point then proceed to declare their rights under a lease which does not exist.

*C. The Breach of Appellee's duties under the lease could not be compensated by the payment of money.*

In its decision the lower Court said, (R. pp. 41, 42) :

"However, something remains to be said by the Court on the subject of forfeiture in this case. The plaintiff has quoted the special statute on the subject of relief from forfeiture (Sec. 17-102, R. C. M. 1947) which provides: 'Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.'

\* \* \* \* \*

"Under the provisions of the special statute quoted the court has authority in a proper case to relieve from forfeiture upon making full compensation."

Citing:

United States v. Forness,  
37 Fed. Suppl. 337;  
Davis v. Taylor,  
51 App. D. C. 97, 276 Fed. 619;  
Sheets v. Selden,  
7 Wall. 416, 19 L. Ed. 166;  
Prout v. Roby,  
82 U. S. 471, 15 Wall. 471;  
In re Gutman, D. C. 197 Fed. 472;  
Sechrist v. Bryant,  
52 App. D. C. 286, 286 F. 456.

The basis for the above decisions is thus stated in Davis v. Taylor, 51 App. D. C. 97, 276 Fed. 619:

“Interpreting the covenant of the lease in question in the light of the law, as we must do, it signifies that, since the forfeiture provided for therein, *has the single purpose of the payment of the rent*, the moment the rent, interest and costs are paid or tendered, provided this is done while the tenant is in possession, the forfeiture disappears. The debt having been paid there is no occasion for resorting to the security.” (Italics ours).

But in the present case the termination of the lease is *not* based upon the single reason of non-payment of rent. The lease here requires, (a) a quarterly accounting, and (b) payment of additional rent based upon that accounting, (R. pp. 10, 11), and further provides for a termination after default in (a) “payment of the rent” and (b) in “any of the covenants and agreements herein contained to be kept by the Lessee.” (R. p. 19).

The lease here involved is what is known as a percentage lease. Such a lease serves a peculiar purpose. As stated by the witness, Chester McNair, (R. pp. 212, 213):

"Well a percentage lease serves a peculiar purpose. In this wise it effects more nearly equitable partnership so to speak between landlord and tenant in this fashion, that both participate in good business and to a degree both participate in poorer business. It is usually put into effect with a minimum guarantee which is designed to take care of certain fixed expenses, taxes, insurance and depreciation, repairs if you like, and thereafter there is a participation as between landlord and tenant with the ups and downs of fortunes in the business over an extended period of time. For instance, a landlord or tenant might be reluctant to tying himself over a ten-year period to a fixed flat rental. The landlord might be reluctant for the reason if the value of the premises went up he wouldn't be able to participate. The tenant would be reluctant because if the value goes down, he would still be tied to a higher flat rental, and so to iron out and make participation an equitable arrangement percentage leases are used and that gives stability over length of term to both.

"Q. It is a compromise arrangement to take care of the good years and bad years?

"A. That is true.

"Q. From the standpoint of the landlord as well as the tenant?

"A. That is right."

That the accounting of sales under a percentage lease is most important to the landlord is evident. Such accountings constitute the only method through which the landlord can ascertain whether or not he is receiving the proper rental from the tenant. Such accountings are the veritable foundation of the lease. The witness, William T. Hill, agent of Appellee, testified, (R. pp. 183, 184):

"Q. You are familiar with the fact that the accounting period under the lease here involved is quarterly income?

“A. Yes, sir.

“Q. Would that mean to you that an accounting is to be made of the wholesale and net retail sales for the prior quarter?

“A. Yes, sir.

“Q. And if there is a rental payable on the basis of the lease that is a percentage rental that a check should accompany that account, is that correct?

“A. That is correct.

“Q. Well now what sort of an accounting should be made under a lease of this character which requires a quarterly accounting?

“A. Well that originates from sales records and expenses in the retail store which it covers. That in turn is forwarded to Denver to the retail office daily. They transcribe that on a regular form which is provided showing all of the other incidentals, profits and otherwise, a copy of which is sent to the Minneapolis home office division of Gamble-Skogmo, Inc., upon which the accounting department computes quarterly, semi-annually or annual sales.

“Q. And these daily accountings made by the store and then sent to Denver and by Denver to the office in Minneapolis are these sheets here that Mr. Cockayne was testifying from, are they not?

“A. That is correct.

“Q. And are available both to the Minneapolis office and Denver regional office daily?

“A. Those sheets are not prepared daily. The sales records from the store as well as the expense items are forwarded to Denver. These are monthly statements, Mr. Hall.

“Q. So that sometime right after the end of each quarter the Minneapolis office has a full and complete accounting of all sales made?

“A. That is correct.

“Q. Of wholesale or retail?

“A. That is correct.

“Q. In all of the departments of each individual store, that is the situation?

“A. That is correct, yes, sir.

“Q. Now what did Gamble-Skogmo mean by a quarterly accounting to be rendered to McNair Realty?

“A. In each three months a transmittal would be forwarded to McNair Realty indicating the sales required or accomplished in that period of time.”

With respect to the required accountings the witness, Chester McNair, testified, (R. p. 296).

“A. That notice was served—well, it was, I think, October 3rd, if I am thinking of the same notice.

“Q. Yes, October 3rd, 1949?

“A. October 3rd, 1949.

“Q. Now after that—at that time did you have any information—and when I say ‘you’—did McNair Realty have any information as to the amount of the wholesale sales and the farm sales which had been omitted from the accountings made by the Gamble-Skogmo Company over a period of years or the amounts which they owed you for rental?

“A. No information.

“Q. For those items?

“A. No information.

“Q. You had never received any such information from the Gamble-Skogmo Company?

“A. No.

“Q. Did you take any steps to obtain that information?

“A. Why, yes. You, as counsel, subpoenaed Mr. Cockayne and his records for a deposition.

“Q. And his deposition was taken on October 24th, 1949?

“A. That is true.

“Q. And at that time he produced the store records showing the total retail sales and the total wholesale sales in evidence?

“A. That is true.

“Q. And those are the store records which we have in court today, is it not?

“A. That is true.”

Thus, until October 24th, 1949, the Appellant had no knowledge of the amount of delinquent rental owed to it by Appellee. The record here shows demand after demand for the required accountings without result. (Exhibit 16, R. pp. 189, 190, 192, 193, 195, 261, 263, 265, 266, 267, 268, 273, 280; Exhibit 26, R. pp. 348, 349.) Finally, the Appellant was forced to bring the records into Court and take the deposition of Appellee's Manager. (R. p. 296). This was done at the expense of hiring counsel, as well as the expenditure of time, all of which could have been well avoided had the Appellee lived up to its lease.

In 21 C. J. p. 102, sec. 77, the rule is thus stated:

“While equity will relieve a tenant from forfeiture for nonpayment of rent at the time it is due, although the breach is willful on the part of the tenant, it will not generally grant relief for breach of other covenants, in the absence of other equitable circumstances, it being impossible for the tenant to show affirmatively that compensation can be made. Thus relief is not ordinarily given in case of the breach of a covenant to insure, to make repairs, to pay taxes, or to do or not to do any specific act.”

See also:

30 C. J. S. Sec. 56 (b), pp. 394, 395;

Brewster v. Lanyon Zinc Co.,  
72 CCA. 213, 140 Fed. 801;

Pierce v. New York Dock Co.,  
CCA. N. Y., 265 Fed. 148;

Gas & Electric Securities Co. v. Traction Corp.,  
CCA. N. Y., 266 Fed. 625.

The Appellee, neither in its complaint or its evidence, suggests a method through which the breach of the covenant to account is or could be compensable. Thus it fails to state a cause for relief from forfeiture under Section 17-102, Revised Codes of Montana, 1947, quoted supra. Under that statute, before plaintiff may appeal to a court of equity for relief from a forfeiture it must "set forth facts which appeal to the conscience of a court of equity."

Estabrook v. Sonstelie,  
86 Mont. 435, 440, 284 Pac. 147;

Ellinghouse v. Hansen Packing Co.,  
66 Mont. 444, 449, 213 Pac. 1087;

Huston v. Vollenweider,  
101 Mont. 156, 164, 53 Pac. (2d) 112.

No such facts are alleged and proven here. Indeed, the Appellee's own proof shows a callous indifference to the requests and demands of Appellant. Paraphrasing the language of Justice Swayne in Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166, "a case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the *appellee* throughout the difficulties between the parties is not persuasive to lend it its aid."

*D. Failure of Appellee to Make Tender.*

The Appellee at all times knew the exact amount due the Appellant upon net retail sales of farm equipment and farm machinery. In fact, until October 24, 1949, Appellee

was the only one who had such knowledge. With this knowledge the Appellee refused at all times to make any accounting and not until after the filing of the lower Court's Findings of Fact and Conclusions of Law did the Appellee make any tender of the amount of rent claimed to be due and which its own records showed to be due. (R. p. 66).

In the case of Huffine v. Lincoln, 87 Mont. 267, 282, 287 Pac. 629, the Supreme Court of Montana, said:

"But even if the statute is applicable and, while it is true that forfeitures are not favored, contracts making time of the essence thereof and providing for their termination on default are not contrary to law or public policy, and courts will not undertake to make new contracts for the parties, but will enforce such provisions in a contract unless waived, or the party for whose benefit the provisions are inserted is estopped from asserting them, or performance has been prevented by circumstances sufficient to relieve the defaulting party from performance. (Fratt v. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700.)

"The defendant, George Lincoln, was put on his guard early in March, 1927, and even though, as contended, the notice then given was an 'arbitrary notice that the contract was at an end,' this defendant knew that, under the contract he then had ten days in which to repair his default, yet he did nothing then, nor thereafter during the six months elapsing between that notice and the commencement of the action, although he was specifically notified twenty days before the action was commenced that unless he acted within ten days the contract would be terminated. Had he, as he now claims, been unable to make tender by reason of lack of knowledge as to the balance due, he could at least have made that claim to plaintiff, before his rights became forfeited, and sought an adjustment. As to this claim made for the first time in the answer filed, having heard his tes-

timony and observed the witness on the stand, the trial court found that his claim ‘was untrue,’ and with this finding we cannot interfere.

“The court’s finding, coupled with defendants’ failure to make timely attempt to protect their rights under the contract, establishes a ‘willful breach’ of the contract by either ‘inability or unwillingness to perform.’ (Oscarson v. Grain Growers Assn., above).”

See also:

30 C. J. S. p. 397;  
Bonfils v. Ledoux,  
CCA., 266 Fed. 507;

Suburban Homes Co. v. North,  
50 Mont. 108, 19, 145 Pac. 2;

Yellowstone County v. Wight,  
115 Mont. 411, 418, 145 Pac. (2d) 516.

Here, after demands, commencing in July, 1948, and continuing thereafter, for an accounting and payment of the delinquent rental the Appellee did nothing other than to ignore or refuse Appellant’s requests. In the action filed herein, it takes the position that it owes nothing. During the trial it took the same position. While offering to pay “full compensation” in its complaint, (R. p. 6), and through its agent at the trial, (R. pp. 178, 179), this offer was contingent upon an unfavorable decision by the court, and there was no payment or tender of payment until after such decision. Appellee gambled and lost and now desires to have its lease reinstated. Its failure to make a timely attempt to protect its rights under the lease established a willful breach of contract by either inability or unwillingness to perform.

Huffine v. Lincoln,  
87 Mont. 267, 282, 287 Pac. 629.

*E. The Refusal to Account or to Pay the Rental Due was Willful, Fraudulent and Grossly Negligent.*

At the trial the Appellee relied upon and the lower Court's decision on the matter of relief from forfeiture was based upon Section 17-102, Revised Codes of Montana, 1947, which is as follows:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Section 19-103, subd. 15, provides that the word "willfully" "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Actual fraud is defined by section 13-308, R. C. M., 1947, as follows:

"ACTUAL FRAUD, ACTS CONSTITUTING. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

Constructive fraud is defined by Section 13-309, R. C. M., 1947, as follows:

"CONSTRUCTIVE FRAUD. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,

2. In any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud."

Gross negligence is defined as a failure to use slight care.

Batchoff v. Craney,  
119 Mont. 157, 166, 172 Pac. (2d) 308.

That the Appellee acted "willfully" in the matter of its refusal to account for farm sales or to pay the percentage rental due thereon appears too plain for argument.

Our Section 17-102, herein relied upon by the Appellee, apparently came from Section 3275 of the California Civil Code which is identical. Section 3275 was construed by the California Supreme Court in the case of Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702, to which the attention of the court is called. This decision has been followed by the California Courts down to the present day.

El Rio Oils v. Chase, Cal. App.,  
207 Pac. (2d) 885.

In other portions of our brief, (pp. 15, 25, 32) we have called the Court's attention to the repeated requests and demands made by Appellant for an accounting of farm

equipment sales made by Appellee and the payment of additional rental due.

The only replies ever made to such repeated demands and requests are found in two letters—one from the Real Estate Department dated September 27, 1948, and one from Appellee's General Counsel dated November 15, 1948. (R. pp. 269, 279). The last of such letters closes with the following words, (R. p. 280) :

“There is no point in reporting the sales of the farm store to you.”

Appellee knew of the demands of Appellant, both for an accounting and for payment, throughout the period July, 1948 to October, 1949. (R. pp. 196, 197). Nevertheless it knowingly, willingly, and purposely refused either to account or to pay. This “unwillingness” to perform the plain provisions of the lease constituted a “willful breach” of the contract between Appellant and Appellee.

Huffine v. Lincoln,  
87 Mont. 267, 268, 287 Pac. 629.

The suppression of the facts with reference to farm sales constituted fraudulent conduct under the provisions of Section 13-308, R. C. M., 1947.

Under the facts it seems clear that the provisions of Section 17-102, R. C. M., 1947, cannot here apply even though we should concede the power of the Court to grant such relief in a proceeding such as this.

It is respectfully submitted that the portion of the judgment whereby the lower Court afforded relief to Appellee from the termination of the lease, and in effect reinstated the lease should be reversed.

Respectfully submitted,

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SERVICE admitted this.....day of....., 1951.

Attorneys for the Appellee,  
Gamble-Skogmo, Inc.



United States  
Court of Appeals  
for the Ninth Circuit

McNAIR REALTY COMPANY, a Corporation,  
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee,

GAMBLE-SKOGMO, INC., a Corporation,  
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,  
Appellee,

**Appeal from the United States District Court  
for the District of Montana**

**BRIEF OF GAMBLE-SKOGMO, INC.,  
a Corporation, Appellant**

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Filed ..... , 1951

Clerk



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NO. 12944

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United States  
Court of Appeals  
for the Ninth Circuit

McNAIR REALTY COMPANY, a Corporation,  
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee,

GAMBLE-SKOGMO, INC., a Corporation,  
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,  
Appellee,

Appeal from the United States District Court  
for the District of Montana

BRIEF OF GAMBLE-SKOGMO, INC.,  
a Corporation, Appellant

APPEARANCES:

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Cross-Appellee.

## JURISDICTION

The Jurisdiction of the case was in the District Court because the plaintiff, Gamble-Skogmo, Inc., is a Delaware corporation, and the defendant, McNair Realty Co., is a Montana corporation. The amount in controversy exceeds, exclusive of interest and cost, the sum of THREE THOUSAND AND NO/100 DOLLARS (\$3,000.00). The statutory provision believed to sustain the jurisdiction of the District Court is 62 Stat. 930, Title 28 U.S.C.A. Sec. 1332. The pleadings necessary to show the existence of the jurisdiction in the District Court are set out in Paragraph I of the plaintiff's Complaint, (R 3)

The action was one for declaratory relief under 62 Stat. 964 as amended May 24, 1949 c. 139, Sec. 111, 63 Stat. 105, Title 28 U.S.C.A. Sec. 2201. Plaintiff, as lessee, and defendant, as lessor, entered into a written lease on December 27, 1943 for a one story building and basement located in Great Falls, Cascade County, Montana. Thereafter and prior to October 3, 1949, the defendant claimed that the plaintiff was in default of certain provisions in the written lease pertaining to the payment of rent and to the covenant of the plaintiff to furnish accountings to the defendant. On October 3, 1949, the defendant sent a letter to the plaintiff purporting to terminate said written lease. The plaintiff denied that the written lease was terminated. On October 10, 1949, the defendant demanded possession of

the leased premises from the plaintiff, which demand was refused. On November 1, 1949, the plaintiff filed a complaint against the defendant setting forth controversies and praying for a declaration of the plaintiff's rights and other legal relations under the written lease and facts hereinabove set forth. (R 3-25)

It is contended that this Court has jurisdiction under 62 Stat. 929, 28 U.S.C.A. Sec. 1291, and under 63 Stat. 105, 28 U.S.C.A. Sec. 2201. This appeal is from part of a judgment of the United States District Court for the District of Montana which judgment was filed and entered on March 14, 1951. (R 58-60)

A Notice of Appeal was filed by the defendant, McNair Realty Co., from a part of the judgment on April 2, 1951. (R 60 & 61) The Notice of Cross-Appeal from part of the judgment was filed by the plaintiff, Gamble-Skogmo, Inc., on April 13, 1951, (R 63 & 64) It is this cross-appeal with which we are here concerned in this Brief. An Undertaking on Cross-Appeal was also filed on April 13, 1951 by Gamble-Skogmo, Inc., the plaintiff. (R 64 & 65) On April 17, 1951, the plaintiff, Gamble-Skogmo, Inc., filed a Designation of Points to be Relied Upon the Cross-Appeal. (R 70-73) This Designation of Points was adopted for the cross-appeal before this Court, and was filed in this Court on June 4, 1951. (R 371 & 372)

## STATEMENT OF THE CASE

This is a suit for declaratory relief in which the plaintiff seeks to have its rights and other legal relations determined pertaining to a written lease and certain efforts of the defendant to terminate that lease. The written lease in question is dated December 27, 1943, and was entered into between Gamble-Skogmo, Inc., a Corporation, as lessee, and McNair Realty Co., as lessor. There is no dispute about the execution, and the wording of the lease which is set forth in plaintiff's Complaint as Exhibit A. (R 9-23)

Since this action involves an appeal by McNair Realty Co., defendant below, and a cross-appeal by Gamble-Skogmo, Inc., the plaintiff below, in this brief was shall try to avoid confusion by referring to the parties under the same designation that they had in the District Court as plaintiff and defendant.

Plaintiff is a Delaware Corporation, having its principal office and place of business in Minneapolis, Minnesota, and is engaged generally in the merchandising business. Defendant is a Montana corporation, having its principal office and place of business in Great Falls, Montana, and is engaged generally in the real estate business. Defendant was and is the owner of the premises leased under the written lease of December 27, 1943. These premises consist of a one-story building and basement, located at 521-523-525 Central Avenue in Great Falls, Montana, and used during the existence

of the lease by the plaintiff as a store. These premises will be hereinafter referred to as the department store to distinguish them from other premises.

The lease of December 27, 1943, provided that the plaintiff should take possession of the department store premises as of March 1, 1944. On, or soon after that date, the plaintiff went into possession of the department store premises and commenced operation of the same as a department store. The plaintiff remained in possession of the department store premises at all times up to and including the time of the trial.

When the plaintiff first took possession of the department store premises, the plaintiff used the premises only for the sale of general department store merchandise described in their records as Unit 1. During the year 1946, plaintiff started to operate a lunch counter on the department store premises which is described in the plaintiff's record as Unit 2. In January of 1947, the plaintiff also started to operate a farm store in the city of Great Falls, Montana, which is identified on the plaintiff's records as Unit 5. Part of the farm store, or Unit 5, activities occurred in the department store premises, and part occurred on other premises not connected with the lease of December 27, 1943. The question as to whether or not the sales of farm store items are within the provisions of the lease of December 27, 1943, is one of the principal issues of this Appeal.

The lease of December 27, 1943 was characterized by both plaintiff and defendant as "a percentage lease." It provides for a minimum base rental of \$5,400.00 per year payable monthly in advance. There is no contention between the plaintiff and defendant as to these monthly minimum rental payments. However, one of the principal issues concerns the interpretation of the percentage clause in the lease which provides that the plaintiff as lessor, shall also pay to the defendant as lessee:

**"Two percent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars \$270,000.00) per lease year, had and obtained on the above-described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.**

Should lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for." (R 10 & 11), (Emphasis supplied)

The lease year started March 1st of each year and terminated on the last day of February of the following year, with the first lease year beginning March 1, 1944. During the first two lease years the plaintiff did not make net retail sales over Two Hundred Seventy Thousand and No/100 Dollars (\$270,000.00) and consequently did not pay any rental under the percentage clause. (R 227 & 233)

In 1946 the department store premises were remodeled and improved. Chester McNair, the President of the defendant corporation, testified that a primary reason for the remodeling was to attract more customers for retail sales. (R 318) During the third lease year, the plaintiff expended the sum of \$29,342.46 for remodeling and improvements. (R 100) At the same time, the plaintiff expended the sum of \$87,107.99 putting the new fixtures in the department store. (R 102) After these expenditures on the part of the plaintiff were made, the net retail sales increased and the plaintiff paid the defendant the rental payments under the percentage clause of the lease of December 27, 1943. The store records disclosed that the net retail sales for the third lease year was the total sum of \$567,737.86 and that the plaintiff paid the total rent of \$11,354.76. (R 97) During the fourth lease year, the store records show that the net retail sales to have been \$588,309.90 and the plaintiff paid the rental of \$11,766.20. (R 98) During the fifth lease year, the records disclosed total net retail sales of \$703,402.77, and the plaintiff paid a total rent of \$14,068.00. (R 98) The trial occurred during the sixth lease year, but the records were complete for the first nine months of that lease year, through November 30, 1949. The store records disclose that during that period of time, the total retail sales were \$469,422.33 and the total rent paid for that period was the sum of \$9,111.80. (R 99)

There is no dispute that the plaintiff reported the above net retail sales, and paid the 2% rental on any excess of the reported net retail sales over the figure of \$270,000.00 annually. However, one of the issues of this cross-appeal involves the contention made by the defendants, and opposed by the plaintiff, that the plaintiff made certain net retail sales which were "had and obtained" on the leased premises, which were not included in the report of total net retail sales, and upon which the 2% was never paid. The sales in dispute were the sales of farm implements and equipment. Plaintiff admits that it has not included the sales of farm implements and equipment in its quarterly or annual reports to the defendant, and that it has not paid the 2% rental upon such sales. Plaintiff contends that such sales were not within the terms of the lease as they were not "had and obtained" on the demised premises in that such sales were made on two or more other premises leased by the plaintiff and operated as a farm store.

At the time the lease of December 27, 1943 was entered into, the plaintiff was not in the business of selling farm implements and equipment either in Great Falls or elsewhere in the United States. (R 166 and 167) During the year 1946, the plaintiff started setting up farm stores throughout the United States. As of the date of the trial, the plaintiff has installed eighteen such farm stores, including the one at Great Falls, Montana. In general,

the plaintiff had set these stores up as separate stores and had paid rent upon them upon a flat rental basis rather than a percentage basis. (R 168 & 169)

During the year 1946 the plaintiff made arrangements to start a farm store in Great Falls, Montana. The farm store was set up to sell, and ultimately sold heavy farm implements and equipment such as tractors, combines, mowing machines, rakes, and the necessary parts for such equipment. These items are carried on the books and store records of the plaintiff designated as Unit 5. It was almost a physical impossibility to set up the farm store in the department store building. The doors and other facilities were so small that it would have been impossible to move such large and heavy items in and out of the department store building without taking them apart and moving them piecemeal. (R 170) Therefore, the plaintiff made arrangements, and ultimately leased several other properties in Great Falls, Montana for the storage and display of farm implements and equipment. Starting January, 1947, the plaintiff started the sale of farm implements and equipment which were stored and displayed at the two other premises. One of the premises so leased was a warehouse and a lot located immediately across the alley to the North of the department store. Part of the farm implements and equipment were stored and sold on the premises, which will be hereafter referred to for the

sake of convenience as the farm store. It so happened that these farm store premises were also owned by the defendant, although the premises themselves are not leased under the written lease of December 27, 1943. In its operation of a farm store, the plaintiff also leased a building from the Roy Anderson Company. This building was located approximately two miles from the department store and was also used for the storage and display of farm implements and equipment. (R 83-85) For the sake of convenience, these premises will be hereinafter referred to as the Anderson warehouse.

Part of the activities involved in the sale of farm implements and equipment was carried on at the Anderson warehouse. Part of the activities involved in the sale of farm implements and equipment was carried on at the farm store, and part of the activities involved in such sales were carried on in the department store. It is the plaintiff's contention that not enough of those activities were carried on on the department store premises so that the sale of farm equipment came within the provisions of the percentage rental in the lease as being "had and obtained" on the demised premises.

A discussion of what activities were carried on on the department store premises and what activities went on elsewhere on the two other leased premises will be set forth later in this Brief under ARGUMENT.

The District Court made a Finding of Fact that

the sales made by the farm store were had and obtained upon the demised premises and that the plaintiff was obligated to pay defendant 2% on such sales. (R 49-55) The District Court also made a Conclusion of Law as follows:

I.

“The defendant, McNair Realty Company, a Corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a Corporation, is indebted to the defendant in the sum of \$5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, together with interest upon such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of \$5,931.18” (R 55 & 56)

The District Court also made a Conclusion of Law to the effect that the plaintiff was in default with respect to the covenant contained in the lease relating to the payment of rental and to the quarterly accounting, and that the defendant was entitled to the immediate possession of the premises unless the plaintiff should pay the defendant within fifteen days after the entry of the Findings and Conclusions, the sum of \$5,931.18 plus the costs of the action. (R 56) The Findings of Fact and Conclusions of Law were filed January 24, 1951. Thereafter, on the 6th day of March, 1951, tender of the above sums were made to the defendant which proper tender was acknowledged and refused. (R 66) On March 14, 1951 the District Court filed and entered its judgment. (R 60) That judgment de-

creed that by virtue of the tender on March 6, 1951 plaintiff was relieved from the termination and forfeiture of said lease. On April 2, 1951, the defendant filed its notice of appeal from that portion of the judgment whereby the plaintiff was relieved from the termination and forfeiture by virtue of the said tender. We understand that we are not permitted to and shall not deal with that issue on this cross-appeal.

Thereafter, on the 13th day of April, 1951, the plaintiff filed its Notice of Cross-Appeal in which the plaintiff appealed from that portion of the judgment which decreed that the plaintiff was in default in respect to the covenants in the lease relating to the payment of rental, and to the quarterly accounting to be made to the defendant covering net retail sales. (R 63) The plaintiff also appealed from that portion of the judgment which decreed that the defendant was entitled to possession of the leased premises of October 10, 1949, and that the defendant was entitled to recover the defendants costs in the action below. The appeal was made from these portions of the decree as a necessary corollary to the principal issue of whether or not the plaintiff was in default of the covenants in the lease relating to the payment of a percentage rental on farm store sales.

On April 17, 1951, plaintiff filed it's Designation of Points to be Relied Upon on Cross-Appeal. (R 70-71) Most of the points therein designated, are

concerned with the principal issue of this cross-appeal hereinabove discussed, as to whether or not the plaintiff was in default of the percentage rental provision of the lease of December 27, 1943. These points may be identified in the Designation of Points to be Relied Upon on Cross-Appeal as numbers 1, 2, 3, 4, 5, 6, and 10.

Another question raised in this cross-appeal involves certain negotiations which took place between the plaintiff and the defendant from October 24 to October 28, 1949. When evidence of these negotiations were introduced at the time of the trial, we, as Counsel for the plaintiff, objected to the testimony upon the grounds that the negotiations were of a compromise nature and not properly admitted as evidence. (R 298 et seq.) Testimony on the same negotiations also was introduced by the plaintiff. (R 198 et seq.) The District Court allowed the evidence to be taken, subject to objection, and stated it's opinion that all of the evidence relating to this subject should be excluded from the case, "and that such is the order of Court herein." (R 36) The plaintiff's contention is that certain of that evidence was to the effect that a tender was made by the plaintiff to the defendant during those negotiations which entitled the plaintiff to relief from forfeiture of the lease. This issue is presented in numbers 7, 9, and 10 of the Designation of Points to be Relied Upon on Cross-Appeal. (R 71 and 72)

Another question raised in this cross-appeal is

whether or not the defendant waived it's right, if any existed, to the percentage rental on the sale of farm store items and whether or not the defendant waived it's right, if any existed, to declare a termination of the lease. Plaintiff contended in the District Court that there were such waivers. The facts surrounding such waivers are generally in dispute, and for the sake of brevity will be set forth at length under ARGUMENT below. The District Court made the Finding of Fact No. IX to the effect:

“The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3, 1949, and at all times thereafter, entitled to terminate said lease by reason thereof.” (R 54)

Numbers 13 and 14 of the Designation of Points to be Relied Upon on Cross-Appeal deal with this question.

On April 17, 1951, the plaintiff served and filed it's Designation of Points to be Relied Upon by Appellee and Appellant on Cross-Appeal. (R 70-73) This was adopted for this appeal before this Court of Appeals. (R 371 & 372) The Specifications of Errors below in general are the same as are contained in that Designation of Points to be Relied Upon by Appellee and Appellant on Cross-Appeal, and in general contain the same wording. The only exceptions are that numbers 8 and 11 of the Designation of Points have been ommitted, and that number 9 of the Specifications of Errors requires under the rule of this Court, a statement as to the evidence introduced and objected to.

## SPECIFICATIONS OF ERRORS

1. The judgment and decree of the District Court is erroneous insofar as it adjudges that at the time of filing of its complaint, the plaintiff was in default with respect to the covenants contained in the lease of December 27, 1943, relating to the payment of rental and to the quarterly accounting required to be made by the plaintiff to the defendant covering net retail sales made by the plaintiff for the period January 1, 1947, to August 31, 1949.
2. The judgment and decree of the District Court is erroneous insofar as it adjudges that as of December 23, 1949, the plaintiff was indebted to the defendant for unpaid rental in the sum of \$5,177.70 in that as of December 23, 1949, the plaintiff did not owe the defendant anything for unpaid rental.
3. The sales of farm machinery and equipment were had and obtained on two other premises other than the demised premises and were not "had and obtained" on the demised premises.
4. By their acts and correspondence, both the plaintiff and the defendant placed a practical construction upon the lease of December 27, 1943, to the effect that sales of farm machinery and equipment were not included within the provisions of the lease of December 27, 1943.
5. The plaintiff was not in default of any of the terms of the lease of December 27, 1943, on the date of October 3, 1949, nor at the time of the filing of the plaintiff's complaint.

6. The judgment and decree of the District Court is erroneous insofar as it adjudges that by reason of certain defaults the defendant was entitled under the terms of the lease to declare the lease terminated on October 3, 1949, and that the defendant was entitled to the possession of the leased premises on October 10, 1949.

7. If the plaintiff is in default under the terms of lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24 to October 28, inclusive, in 1949, the tender made in the plaintiff's complaint, and the tender made by the plaintiff's representative during the course of the trial.

8. In addition to the provisions of Section 17-102, Revised Codes of Montana, 1947, plaintiff is also entitled to be relieved from forfeiture in the event of default because the strict enforcement of the forfeiture or termination clause would be unjust, oppressive, and contrary to the general principles of equity.

9. The opinion and order of the District Court is erroneous insofar as it excluded from the case any evidence of a tender of full compensation by the plaintiff to the defendant during the period of time from October 24 to October 28, inclusive, 1949.

Both Mr. Hill as witness for the plaintiff, and

Mr. Chester McNair as a witness for the defendant testified as to a series of negotiations which took place during the period from October 24 to October 28, inclusive, during the year 1949. Objections were made on behalf of the plaintiff to this evidence as on the grounds that it was evidence of a compromise nature. The testimony leading up to such an objection and the objection itself may be quoted as follows:

#### **TESTIMONY OF CHESTER McNAIR**

Q. And was there a meeting arranged for between yourself and Mr. Williams?

A. By the next day - - -

Q. And Mr. Hill and myself for the next day?

A. By the next day, you mean - - -

Q. That would be October 25th?

A. It was arranged. We met in your office in the morning.

Q. And briefly the three of you and Mr. Cockayne appeared in the office, did you not?

A. Yes.

Q. And did anyone have a checkbook?

A. I presume it was a checkbook? I didn't examine it sufficiently.

Q. Well, who opened the conversation in my office if you recall?

A. I believe Mr. Williams.

Q. And did he identify himself as being the representative, that is, attorney for the Gamble-Skogmo Company?

A. He identified himself as being counsel for the representative.

Q. And what did he say?

Mr. Williams: If the Court please, at this time I would like to object to this line of testimony on the ground that the evidence shows that these negotiations were of a compromise nature, and evidence of a compromise nature is not properly admitted in evidence.

Mr. William T. Hill testified in effect that during these negotiations from October 24 to October 28, 1949 the plaintiff offered to pay the defendant the sum of \$5,161.60, or whatever was the correct figure which would represent 2% on net retail sales of farm machinery. Mr. William T. Hill further testified in effect that the sum of \$5,161.60 was offered at a time when the plaintiff's representative had a checkbook and the authority to write a check. The offer was made with the understanding that the old lease of December 27, 1943 would remain in effect.  
(R 198-204)

Mr. Chester McNair's testimony on the same subject is contained in the Record from pages 297-306, and from pages 339-345, and pages 351-352, all inclusive. Mr. Chester McNair testified in effect that the plaintiff offered the defendant during these negotiations the sum of \$5,161.60 which was accepted by the defendant as representing the 2% percentage rental on farm sales to October 19, 1949. Chester McNair further testified that the figure and

the sum were acceptable to the defendant only in the event the lease of December 27, 1943 was terminated. He testified that the plaintiff and the defendant entered into negotiations for a new lease based upon his understanding that the old lease was terminated. (R 297-306). Chester McNair also testified in effect that the defendant would accept the sum of \$5,161.60 with no strings attached, but would not accept it if it was made in an offer which involved the old lease remaining in effect. (R 339-345)

The District Court said in its opinion at Page 36 of the Record:

“The negotiations for a comprise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence relating to this attempted compromise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of the Court herein. It would appear from the provisions of the statute and authorities (R.C.M. 1947, 93-2201-3) that evidence of compromise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise, it is in evidence that no settlement occurred. (*Hufine v. Lincoln*, 53 Mont. 474.) In the strict sense of the word, there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise.”

The plaintiff made the original objection, and believes the Court properly excluded the introduction of evidence relating to an attempted compromise. However, if that order is interpreted to exclude the evidence of a tender of full compensation made by the plaintiff to the defendant during the period of compromise negotiations, the plaintiff contends that the order excluding such evidence is erroneous.

10. The judgment and decree of the District Court is erroneous insofar as it adjudges that the defendant have and recover from the plaintiff the defendants costs which were taxed at the amount of \$362.25.

11. The defendant waived its rights, if it ever had any, to demand a quarterly accounting on a net retail sales of farm machinery and equipment and to claim a 2% rental on said sales.

12. The defendant waived its rights, if it ever had any, to enforce the forfeiture or termination of the lease of December 27, 1943.

## ARGUMENT

### SUMMARY

I. The sales of farm implements and equipment do not come within the provision of the lease of December 27, 1943, requiring a rental of 2% on "net retail sales" - - - "had and obtained" - - - on the demised premises.

A. The correct test is whether the farm store as

it was set up did in fact constitute a revenue producing activity which the parties intended should become a basis of calculation of "net retail sales" at the time the lease was entered into.

1. The farm store activities which took place on the demised premises were so few and of such a nature, that they did not affect the income producing activities which the parties intended should become a basis of calculation of "net retail sales."

2. It was physically impossible to operate the farm store on the demised premises.

B. Since December 27, 1943, the parties themselves have placed a practical construction upon the lease to the effect that farm sales are not included within the rental provisions of the lease.

1. The plaintiff has demonstrated its practical construction of the lease in the manner of setting up and operating the farm store.

2. The defendant has acceded to plaintiff's construction by its permission of the plaintiff's act, and by the interchange of letters relating to the lease of the farm store premises.

II. If the plaintiff is in default under the terms of the lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24th to October 28th, inclusive, in 1949, the tender made in the plaintiff's complaint, and the tender made by the plaintiff's

representative during the course of the trial.

A. Section 17-102 Revised Codes of Montana, 1947, applies to this case.

B. The general principals of equity require such a relief from forfeiture.

III. The defendant has waived its right, if ever it had any, to claim a 2% rental on farm store sales.

A. Defendant continued to cash the percentage rental checks, and the other monthly rental checks after defendant had knowledge that the farm store sales were not included.

B. The defendant continued to rent the property to the plaintiff on which the farm store sales were made after the defendant had knowledge that it was not receiving a 2% rental on such sales.

IV. The defendant has waived its right, if it ever had any, to claim a termination and forfeiture of the lease of December 27, 1943:

A. The defendant continued to accept and cash all rental checks after it had knowledge that farm store sales were not included. Of special importance is the fact that the defendant accepted and cashed the check of October 3, 1949.

B. The defendant continued to lease the property to the plaintiff on which the farm store sales were made after the defendant had knowledge that it was not receiving 2% rental on such sales.

C. Plaintiff demanded a percentage rental on farm store sales up to the date of October 19, 1949, which could only be owing in the event the lease of December 27, 1943 was still in effect as

of October 19, 1949.

I.THE SALES OF FARM IMPLEMENTS AND EQUIPMENT DOES NOT COME WITHIN THE PROVISION OF THE LEASE OF DECEMBER 27, 1943, REQUIRING A RENTAL OF 2 PER CENT ON "NET RETAIL SALES - - - HAD AND OBTAINED" ON THE DEMISED PREMISES. (Specification of Errors, numbers 1, 2, 3, 4, 5, 6 and 10.)

A. THE CORRECT TEST IS WHETHER THE FARM STORE AS IT WAS SET UP DID, IN FACT, CONSTITUTE A REVENUE PRODUCING ACTIVITY, WHICH THE PARTIES INTENDED SHOULD BECOME A BASIS OF CALCULATION OF "NET RETAIL SALES" AT THE TIME THE LEASE WAS ENTERED INTO.

1. THE FARM STORE ACTIVITIES WHICH TOOK PLACE ON THE DEMISED PREMISES WERE SO FEW AND OF SUCH A NATURE THAT THEY DID NOT AFFECT THE INCOME PRODUCING ACTIVITIES WHICH THE PARTIES INTENDED SHOULD BECOME A BASIS OF CALCULATION OF "NET RETAIL SALES".

The lease of December 27, 1943, provides in part that the rental for the demised premises shall be:

"----- at the rate of FIFTY-FOUR HUNDRED and no/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over TWO HUNDRED SEVENTY THOUSAND and no/100 Dollars (\$270,000.00)

per lease year, had and obtained on the above described premises. -----”

(Emphasis supplied) (R 10)

As we have heretofore discussed, the plaintiff started the operation of a farm store in Great Falls, Montana, in January, 1947. That farm store sold farm implements, equipment and parts which were known and described in the Gambles Store records as Unit 5. For this purpose, the plaintiff had leased several different premises. One of these premises was a warehouse located approximately two miles from the department store and leased by the plaintiff from a third party. Another of these premises was a lot and warehouse between First Alley North and First Avenue North leased by the plaintiff from the defendant and designated in this brief as the Farm Store.

The normal procedure for the sale of farm equipment is set forth in the Record at page 144 et seq. In general, the farm equipment and parts were stored, assembled, and displayed at one or the other of these other two properties. These other premises were under the control and management of the farm store manager, Alvin Hunt, who hired and fired the salesmen working under him, ordered new merchandise, supervised repairs, and performed the other necessary duties in the management of a store on those premises. The farm store salesmen worked from these premises and displayed their farm equipment and parts on these premises or took them from these other premises to the farms

for the purpose of demonstration. In the event of a cash sale the sales slip was written either on these premises or at the purchaser's place of business, or farm, and the cash or check was received at the same time. Both the department store manager and the farm store manager testified that in the normal sale none of the proceedings ever took place in the department store until the sale was completed. (R 87, 88, and 149) On all such cash transactions we submit that there is no question but that the title to the property sold passed elsewhere than on the department store premises (Sec. 67-1703, Revised Codes of Montana, 1947).

Contract sales were handled much the same way except that the business office in the department store handled the necessary paper work and checked the credit rating of the prospective purchaser. The contract sales amounted to 2.21 per cent of the total farm sales. (R 91) In addition this same business office also received the sales slips on farm sales after the sale was completed, received the money and did the general accounting for the department store. In this connection, we feel it pertinent to point out that the business office occupied approximately 300 square feet out of a total of 20,000 square feet in the department store. (R 136)

There was considerable evidence back and forth as to the different activities performed on or off the department store premises in connection with the operation of the farm store. Much of this evi-

dence was not concerned with where the sales of farm equipment and parts took place, but with the advertising, bookkeeping, management, where the letters were mailed, and so forth.

The general principle with which we are here concerned is a common one in the interpretation of contracts and has been codified in Montana as Section 13-702 of the Revised Codes of Montana, 1947:

**“Contracts—How to Be Interpreted.** A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

There is an exhaustive annotation on the construction of percentage leases in 170 A.L.R., beginning at Page 1113. The general rule above quoted is stated more specifically in its application to percentage leases in 170 A.L.R., at Page 1130, as follows:

“2. Determination of gross income. There is no rule, formula, or generalization, under the rules of law or accounting practice, which by itself determines what constitutes gross income for purposes of calculating rent under a percentage lease. The parties are free, for the most part, to stipulate respecting the matter, and their stipulations must be construed in the same reasonable manner as other leases. It will be found, however, that regard is in most instances had for what, in fact, constitutes a revenue-producing activity which the parties intended should become a basis of calculation.”

To the same effect are: (Garden Suburbs Golf

and Country Club, Inc. v. Frank O. Pruitt, 156 Fla. 825, 170 A.L.R. 1107, 24 So. (2d) 898; Selber Bros v. Newstadt's Shoe Stores, (1940) 194 La 654, 194 So. 579; Herbert's Laurel-Ventura vs. Laurel-Ventura Holding Corp. (1943) 58 Cal. App. (2d), 138 Pac. (2d) (43).

We submit that the Court is faced with the problem of determining the intention of the contracting parties as of December 27, 1943, in view of the circumstances which ultimately developed as presented by the evidence here. We submit that an examination of all of the evidence justifies the finding of the following intentions of the contracting parties as of the date the contract was entered into:

1. The plaintiff did not have and did not contemplate starting a farm store in Great Falls, Montana, so that there was no specific intent.
2. The intention was not to prohibit the plaintiff from starting other operations in Great Falls, Montana. The evidence shows that there was no attempt by the defendant to prohibit the plaintiff from starting its farm store. In fact, the defendant tried to obtain additional premises to rent to the plaintiff for use as a farm store.
3. The intention of the contracting parties was that if any new operations were started by the plaintiff, those operations should be performed on the premises if possible. (However, the evidence showed that it was physically impossible to operate the farm store upon the department store premises.)

4. The intention of the contracting parties was that if the plaintiff started an operation which it was not possible to put into the department store, the plaintiff should not remove any of the revenue from the department store and should not compete with the department store, so as to decrease the net retail sales. In this connection, the plaintiff should not sell in its new store any items sold by the department store. (The defendant failed to show where the plaintiff removed any revenue or competed in any manner with the department store, in its operation of the farm store. Such evidence as was introduced was to the effect that the department store items and the farm store items were entirely separate and non-competitive) (R 145)

5. If the plaintiff starts a new operation which it is impossible to operate from the department store premises, there still should be a degree of separation. In determining what degree of separation is required, we must assume that as of December 27, 1943, the officers of the defendant were reasonable men and would require only that degree of separation which would assure them that their own revenue on the percentage of net retail sales was not decreased. We cannot assume that they intended a degree of separation which would place an increased burden upon the plaintiff although it would not benefit the defendant. Here it is significant that with all the means of discovery available to the defendant which are afforded by the Federal

Rules, the defendant has submitted no evidence that the farm store in any manner decreased the net retail sales on the department store premises. Rather, all of the claims of the officers of the defendant have been to the effect that here is some additional revenue that we would like to get our hands on.

We realize that the District Court made a Finding of Fact that the sales made by the farm store were had and obtained upon the demised premises. In fact, the District Court listed various activities of the farm store, which took place on the department store premises. It would be possible for us at this time to list an equally lengthy number of activities which took place off the department store premises. We are of the opinion that this listing of various activities would be of little value unless there was some test used to determine whether or not the activities listed were pertinent to the question involved. We submit that an examination of the farm store activities listed by the District Court on Pages 49, 50 and 51 of the Record will prove that those activities had little or nothing to do with the revenue producing activities which the parties must have had in mind at the time of the execution of the lease. We further submit that an examination of all of the farm store activities will reveal that the farm store sales are not the "net retail sales" on which the defendant could reasonably have expected to receive a percentage.

## 2. IT WAS PHYSICALLY IMPOSSIBLE TO OPERATE THE FARM STORE ON THE DEMISED PREMISES.

Undoubtedly, the above argument would have less validity if it had been possible for the plaintiff to operate its farm store on the demised premises. All of the evidence by the plaintiff was to the effect that it was physically impossible to sell farm machinery and equipment such as tractors and combines upon the department store premises. (R 84, 85, and 148) In this connection Dale Cockayne testified as follows: (R 84)

"Q. Has it ever been possible for a prospective purchaser to examine any of the merchandise sold by your farm store on the department store premises at 521, 523 and 525 Central Avenue?

A. No, it hasn't. It would, of course, be impossible to get those items inside the store; not impossible but improbable. You could get them in if you tore them all down and set them back up again."

We know of no contradictory evidence by the defendant. We know of no contention by the defendant that the farm store could have been operated upon the demised premises. We know of no showing by the defendant and of no contention to the effect that the farm store operations decreased the net retail sales actually made upon the department store premises. Under these circumstances, the defendant is reduced to the following

dog-in-the manger argument:

"You, the plaintiff, lease a department store building from us at 521-523-525 Central Avenue. It is true that the department store building is not suitable for the operation of a farm store and that it would be practically impossible to sell and display such things as tractors and combines on those premises. It is true that the operation of a farm store upon other premises would not decrease the net retail sales or the rental which we receive. Nevertheless, if the plaintiff chooses to set up a new farm store in Great Falls, Montana, it must pay us 2% on all sales made at said farm store. The alternative is to set the farm store up as an entirely separate store having no connection with the department store on the leased premises. If there are any such connections between the two stores, we shall claim 2% of the farm store sales regardless of whether or not the particular connection has any effect upon the net retail sales of the department store. If the plaintiff desires to set up a farm store, it cannot take advantage of any of the economies which it could obtain by using the facilities which are already set up in the department store. This is true whether or not those economies in any way decrease our rent or the net retail sales. If the plaintiff uses the "Gamble's Store" name, we shall want our 2% regardless of where the merchandise is actually stored and sold. We shall want our 2% if the farm store uses any of the accounting or bookkeeping services now set up in the department store. We shall want our 2% if the farm store uses the petty cash which is now available in the department store. We shall want our 2% if the farm store deposits its money in the same bank account as we use although all the money ultimately goes to the same destination. We shall want our 2% if a customer comes into the store in response to a newspaper

advertisement regarding the farm implements even though this would indirectly increase the net retail sales of the department store. In short, if the plaintiff uses any of the facilities of the department store for the benefit of the farm store, we shall claim that they are the same store and shall demand our 2% although we have made no claim and produced no evidence that these activities decrease the net retail sales of the department store.”

B. SINCE DECEMBER 27, 1943 THE PARTIES THEMSELVES HAVE PLACED A PRACTICAL CONSTRUCTION UPON THE LEASE TO THE EFFECT THAT FARM SALES ARE NOT INCLUDED WITHIN THE RENTAL PROVISIONS OF THE LEASE.

The general rule on this matter is given in 32 Am. Jur., Landlord and Tenant, Sec. 127, as follows:

“Indeed, where the parties to a lease have placed a given construction upon the ambiguous provisions thereof and have governed their conduct in accordance with their construction, such construction will be given great weight and should, ordinarily, control the interpretation of the contract by the Court.”

(See also Earp v. Mid-Continent Petroleum Corp. 167 Okla. 86, 27 Pac. (2d) 855, 91 A.L.R. 188)

In Musselshell Valley Farming & Livestock Co. v. Cooley (1929) 86 Mont. 276, 283 Pac. 213, the Court said, in part:

“Moreover, where parties to a contract of doubtful or ambiguous meaning have placed a particular interpretation upon it, that interpretation is one of the best indications of their true intent.

(Butte Water Co. v. City of Butte, 48 Mont. 386, 138 Pac. 195)"

In this connection we believe the case of *In re Diversey Bldg. Corp.* 90 F (2d) 703, 34 Am. Bankr. NS 437, is in point. That case involved a percentage lease of an apartment hotel. The lessee had been permitting employees to occupy certain apartments in the hotel and had not charged rent to those employees. The lessee had not accounted as income the rental which would have been paid on such apartments and had paid no percentage on the same to the lessor. The lessor had knowledge of this situation and had continued to deal with the lessee for nearly three years thereafter without objection. The Court held that the parties themselves had placed a **practical construction** upon their lease to the effect that the rental of these apartments was not included within the percentage provision of the lease. The Court said in 90 F (2d) at page 707:

"----- that at all times the lessor or appellee had full opportunity to examine the books and the building and exercised that right many times, and had knowledge, or by the exercise of reasonable care could have had knowledge, that appellant's employees were occupying the seven apartments without paying rent thereof and that appellants had never accounted for such rentals in their reports. Under such circumstances we are unable to conceive why the parties should not be considered as having construed for themselves. In any event, with full knowledge of the facts and making no objection to the reports within thirty days as provided by the lease, we know of no reason why appellee at this late date, in violation

of the lease, should be permitted to question the reports in this respect or to construe the contract differently from that construction the parties had previously placed upon it."

1. PLAINTIFF HAS DEMONSTRATED ITS PRACTICAL CONSTRUCTION OF THE LEASE IN THE MANNER OF SETTING UP AND OPERATING THE FARM STORE.

We don't think that there is any argument but that the plaintiff at least placed the construction that the farm store was not included under the lease in question. The evidence showed that the plaintiff had a general policy in setting up its eighteen farm stores. (R 168 et seq.) The Great Falls farm store was one of the eighteen so set up and was in accord with the general policy. That policy was to set the farm stores up on a separate basis and have them pay a flat rental rather than a percentage rental. The evidence also shows that the plaintiff had a policy never to pay a percentage rental in excess of 2½ per cent and that if the percentage rental applied on farm store sales, the actual percentage being paid by the plaintiff would amount to 4.68 per cent on farm store sales. (R 171 and 172)

If there were any doubt upon the plaintiff's construction on this matter, it would be eliminated by an examination of the correspondence written by the plaintiff to the defendant. Part of that correspondence is contained in plaintiff's Exhibit No. 21, beginning at page 326 of the Record. That letter,

written from the plaintiff to the defendant on the approximate date of April 8, 1946, provides in part:

"The only item different than your suggestion is the one regarding a percentage on sales in the warehouse and lot, and our Merchandising Department objects very strenuously to this. I also feel that is an item differing entirely from our original program and really not applicable in this case. I feel that you and Chet will see the reasonableness of this."

Additional correspondence on the same matter is contained in a letter from the plaintiff to the defendant, dated July 9, 1946, and is part of the defendant's Exhibit No. 16. This letter may be quoted in part as follows: (R 236)

"Regarding the lease on the lot and warehouse at the rear. The company has stood firm against a percentage arrangement on the lease. As originally mentioned, the rental was to be \$60.00 a month and we did not have any mention of the percentages sales that I was aware of. However, Chet, I do not wish to be arbitrary and I will recommend to the company a flat rental of \$75.00 a month, running concurrent to this main lease. If this meets with your and Ben's approval, I will prepare the lease and send it to you." (Emphasis supplied).

The point here is that throughout the entire correspondence the plaintiff made it quite clear to the defendant that under the plaintiff's construction of the lease of December 27, 1943, there was no obligation on the part of the plaintiff to pay a percentage rental on farm store sales.

If the evidence went no further, we feel that

the Court would be placed in the position of determining whether or not the plaintiff's or the defendant's construction of the lease was the most reasonable. However, as we shall see below, the defendant knew of the plaintiff's construction and in certain respects acceded to that construction.

**2. THE DEFENDANT HAS ACCEDED TO PLAINTIFF'S CONSTRUCTION BY ITS PERMISSION OF THE PLAINTIFF'S ACTS AND BY THE INTERCHANGE OF LETTERS RELATING TO THE LEASE OF THE FARM STORE PREMISES.**

Early in 1946, the defendant knew that the plaintiff was contemplating the sales or was actually making sales of farm equipment from the lot and warehouse behind the department store and not included in the lease of December 27, 1943. In view of the last two quoted letters to the defendant from the plaintiff, there can be no question but that the defendant knew that the plaintiff would not sign a percentage lease on the lot and warehouse where the farm store items were sold. The plaintiff has been consistent in that stand and has never changed.

It is not known exactly when the defendant knew that it was not receiving a percentage of the farm sales. Undoubtedly, the interchange of letters regarding the lease of the lot and warehouse should serve as notice to the defendant that the plaintiff was not going to pay a percentage of farm sales

sold on the lot and warehouse. At any rate, it is unquestioned that at least by the summer of 1948, the defendant knew that the plaintiff was not paying a rental upon farm sales sold at that lot and warehouse. (R 261 and 267). In fact, the defendant was able to obtain the exact amount of the farm sales. (R 190).

Under these circumstances, the defendant, knowing the plaintiff's position and interpretation of the lease of December 27th regarding farm sales, could have refused to lease the vacant lot and warehouse and forced a decision on this matter. But it did not. Instead, the defendant wrote to the plaintiff as of May 28, 1946: (R 322 and 323)

**"If you wish to prepare a new lease, and without delay, covering both properties, increasing the minimum by the \$60.00 per month and including all sales, whether from the original store premises, the vacant ground or the warehouse building, under the percentage agreement, we will still stick with our original understanding. This would be in your favor, as you consistently report sales at less than your minimum and would thereby allow you a slack of an additional \$720 per year to build up to before any excess becomes effective. As the matter now stands, this letter serves as a notice that you have the warehouse lot and vacant ground on a month to month basis only and that upon due notice, we may sell or make other disposition of the property in question."** (Emphasis supplied).

It can be pointed out that the above quoted letter was written May 28, 1946, before the defendant actually knew that it was not receiving a percentage

on the farm sales. However, the point is that even after the defendant did know that it was not receiving such a percentage, it continued to rent to the plaintiff and to collect the flat rental, in effect, acceding to the plaintiff's interpretation that the farm sales were not included within the percentage provision of the lease.

We feel that it is important that the defendant felt that it could and did change the terms of the rental on the vacant lot and warehouse. As of June 8, 1948, when the defendant almost certainly knew that it was not receiving a percentage on farm sales, the defendant advised the plaintiff by letter. (R 324)

"This is to advise you that beginning August first next, the rental on the warehouse property, together with the vacant ground adjoining, all being Lot 5, Block 316, Great Falls, Montana, is hereby increased to \$90.00 instead of \$60.00 monthly as heretofore."

If the defendant had not wanted to accede to the plaintiff's consistent stand that the farm sales on this lot and warehouse were not to be included within a percentage basis, the defendant had only to notify the plaintiff in the above quoted notice that the rental also included 2% of all sales on those premises. Or the defendant could have terminated the month to month lease. We think it extremely important that the defendant was attempting to rent the warehouse and vacant lot in two different ways. Insofar as the warehouse and vacant lot themselves were concerned, the defendant was

claiming a flat monthly rental which ultimately ended up at \$90.00 per month. Insofar as sales on that particular lot were concerned, the defendant was demanding a 2% rental. In practical effect, the defendant was attempting to charge the plaintiff \$90.00 per month more rent for a warehouse and vacant lot than the defendant was receiving from the department store premises on Central Avenue. This is true because the flat rental of \$60.00 or \$90.00 per month was not included as a base prior to the time that the percentage rental applied. Thus, although defendant with its words was requesting an interpretation that the 2% of farm sales should be paid in accordance with the lease of December 27, 1943, the defendant's actions belied its words. For, by its actions, the defendant was accepting a flat rental and was not allowing the plaintiff any increase in the base before the percentage rental applied. By a base, we refer to the fact that the lease of December 27, 1943, provides that the net retail sales must exceed \$270,000.00 before the 2% applies. The \$270,000.00 is the base and 2% of that is the guarantee rental of \$5,400.00 per year. If defendant had been consistent, it would have increased that base upon the rental guarantee. In other words, upon a rental of \$90.00 per month or \$1,080.00 per year, the base should be increased by \$54,000.00 which would be added to the \$270,000.00 prior to the time that the percentage rental would apply. This suggestion is contained in the

above quoted letter written from the defendant to the plaintiff on this same subject matter, dated May 28, 1946, at page 323 of the Record. If the plaintiff had acceded to this suggestion of the defendant, it would have saved itself the amount of the flat monthly rental if the defendant's theory here prevails. Since the plaintiff did not acceded to the defendant's suggestion and insisted on paying only the flat monthly rental, we submit that the defendant then acceded to the plaintiff's interpretation by accepting such flat monthly rental and that it cannot now belie its own actions and in addition, insist upon a percentage on such sales.

II. IF THE PLAINTIFF IS IN DEFAULT UNDER THE TERMS OF THE LEASE OF DECEMBER 27, 1943, THE PLAINTIFF IS ENTITLED TO RELIEF FROM FORFEITURE AND TERMINATION OF THAT LEASE, NOT ONLY BY THE TENDER MADE ON MARCH 6, 1951, BUT ALSO BY THE TENDER MADE DURING THE NEGOTIATIONS FROM OCTOBER 24 TO OCTOBER 28, INCLUSIVE, IN 1949, THE TENDER MADE IN THE PLAINTIFF'S COMPLAINT, AND THE TENDER BY THE PLAINTIFF'S REPRESENTATIVE. (Specifications of Errors, numbers 7, 8, and 9.

The District Court stated in its opinion that the defendant did not win in respect to its claim of forfeiture and gave the reasons therefor. (R 39 to 43) The Court also made a Finding of Fact

No. XI. as follows:

“By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereinafter set forth.” (R 54-55)

Thereafter, the Court made its Conclusion of Law, No. V. on Page 57 of the Record:

“Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period.”

The Conclusions of Law were filed February 24, 1951. On March 6, 1951, plaintiff made a tender of payment, which tender was acknowledged and refused. (R66) The Judgment of the District Court was filed and entered on March 14, 1951. (R 58 to 60). Paragraph 3 of that judgment provides in part:

“3. That by the tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the cost of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults---”

This part of the judgment was appealed from by the defendant. (R 60)

Thus the plaintiff has been allowed its relief from forfeiture by the District Court. If this Court upholds the District Court upon the same grounds, the plaintiff has no reason to argue further on this matter. However, if the defendant should prevail in its contention that the District Court erred on these grounds, the plaintiff does not want to be put in a position of abandoning other reasons to reach the same decision.

We realize that the subject of forfeiture will be discussed at length in the defendant's original brief on appeal and in our answer brief. To avoid repetition, we will treat this matter very briefly at the present time to indicate that we have not abandoned the position set up by the Designation of Points to be relied upon on Cross-Appeal, numbered 7, 9, and 10.

#### A. SECTION 17-102, REVISED CODES OF MONTANA, 1947 APPLIES TO THIS CASE.

Section 17-102, R. C. M. 1947 provides:

**“Relief in case of forfeiture.** Whenever, by the terms of an obligation, a party thereto incur a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty.”

This statute was cited by the Court in its opinion (R 41). We cite it again here because we submit

that an examination of all of the evidence relating to the compromise negotiations of October 24th to 28th, inclusive, in 1949, will demonstrate that there was a tender then within the terms of this statute.

**B. THE GENERAL PRINCIPLES OF EQUITY REQUIRE SUCH A RELIEF FROM FORFEITURE.**

These general principles of equity are discussed somewhat by the District Court in its opinion regarding relief from forfeiture. (R 42 and 43) We anticipate that we shall have to deal with this subject at great length in our answer brief to defendant's appeal. We mention it at this time because we submit that all of the following facts bring us within those general principles: The tender made during the negotiations from October 24th to October 28th, 1949, the tender made in plaintiff's complaint, the tender made by plaintiff's representative at the time of the trial, and the tender made after the judgment, on March 6, 1951.

The District Court, in its opinion, ordered that all evidence relating to the effort to effect a compromise should be excluded from the case. (R 36) As we have indicated above, we cannot tell whether that order excludes the evidence of the offer made by the plaintiff to the defendant during the negotiations from October 24th to October 28th, 1949, of full compensation. If the order is so interpreted, we submit that the District Court is in error. We

submit the citations in the Record on Page 36, of R.C.M. 1947, 93-2201-3 is in error and that the correct citation is R.C.M. 1947, 93-2201-5, which deals with a compromise offer. In interpreting that statute, the Supreme Court of Montana said in *Lenahan v. Casey*, 46 Mont., 367, 128 Pac., 601, that:

“Even if it be conceded that the stipulation was an offer of compromise and was conditionally accepted as such, the declaration to the effect that the partnership was still in existence was not essential for the purpose of the compromise, and is not to be regarded as a concession made in order to effect it. This feature of it is the recital of an independent fact and is not within the rule of the statute (Rev. Codes, sec. 8040), that “an offer of a compromise is not an admission that anything is due.” (*Rose v. Rose*, 112 Cal. 341, 44 Pac. 658; *Kutcher v. Love*, 19 Colo. 542, 36 Pac. 152;”)

### III. THE DEFENDANT HAS WAIVED ITS RIGHT, IF IT EVER HAD ANY, TO CLAIM A 2% RENTAL ON FARM STORE SALES. (Specifi- cations of Error, number 11)

The District Court stated in its opinion that there was no waiver in this case on the part of the defendant. (R 40-41) The District Court accordingly made the following Finding of Fact:

“IX. The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof.” (R 54)

The District Court was apparently considering the question as to whether or not there was a waiver

on the part of the defendant of its right to terminate the lease. In this argument the plaintiff now submits that the defendant has waived its right to claim a two per cent rental on farm store sales. This is another aspect of the element of waiver. However, since the general rules of waiver apply to both cases, in order to avoid duplication, we shall discuss the law relating to waiver in this case below under the subject of the waiver of the right to forfeiture.

**A. DEFENDANT CONTINUED TO CASH THE PERCENTAGE RENTAL CHECKS AND THE OTHER MONTHLY RENTAL CHECKS AFTER DEFENDANT HAD KNOWLEDGE THAT THE FARM STORE SALES WERE NOT INCLUDED.**

The evidence is uncontradicted that the defendant repeatedly and without exception cashed all of the regular monthly rental checks and all of the percentage rental checks, even after it had knowledge that these rental checks did not include two per cent on farm store sales. The plaintiff submits that by so doing the defendant waived its right thereafter to claim a two per cent rental on the said farm sales.

**B. DEFENDANT CONTINUED TO RENT THE PROPERTY TO THE PLAINTIFF ON WHICH THE FARM STORE SALES WERE MADE AFTER THE DEFENDANT HAD KNOWLEDGE THAT IT WAS NOT RECEIVING THE 2% RENTAL ON SUCH SALES.**

As we have already pointed out, the defendant knew, on May 28, 1946, and on June 8, 1948, that the plaintiff was using the warehouse and vacant lot for farm sales. On both of those dates, the defendant advised the plaintiff that the rental of that lot and warehouse was upon a flat rental basis. (R 321 and 324) We submit that, as pointed out above, that is a practical interpretation of the lease of December 27, 1943. However, if it is not such an interpretation, we submit that it is a waiver of any right the defendant may have had to require the plaintiff to pay a percentage on the farm sales made at the warehouse or the vacant lot. Unquestionably, the plaintiff was entitled to assume that such rental would be on a flat monthly basis. If the plaintiff had not so assumed, it would have been able to have saved the flat monthly rental by going in on a percentage arrangement and increasing the base prior to the time the percentage applied as hereinabove set forth.

**IV. THE DEFENDANT HAS WAIVED ITS  
RIGHT, IF IT EVER HAD ANY, TO CLAIM A  
TERMINATION AND FORFEITURE OF THE  
LEASE OF DECEMBER 27, 1943. (Specifications  
of Error, number 12)**

The general rule on waiver is set forth in 32 Am. Jur., Landlord and Tenant, at Section 882, as follows:

“Generally speaking, any recognition by a lessor of a tenancy as subsisting after a right of entry has accrued where the lessor has notice of the

forfeiture, will have the effect of a waiver of the landlord's right to a forfeiture of the leasehold. Slight acts on the part of a lessor may be sufficient."

To the same effect is 51 C.J.S., Landlord and Tenant, Section 117 (2), at Page 704, et seq.

In Woppard v. Schaffer Stores Company, Inc., 272 N. Y. 304, 5 N.E. (2d) 829, 109 A.L.R. 1262, the acceptance of rent after the violation of the terms of the lease is involved. In that case the tenant violated the lease by sub-letting and by making alterations without the landlord's permission. The landlord served written notice that he elected to terminate the lease. Thereafter the landlord cashed various checks written by the tenant which checks purported to be in payment of monthly rents. Most of the endorsements by the landlord were "subject to litigation pending." There followed a suit for a declaratory judgment and the New York Court of Appeals said in 109 A.L.R., at Page 1265:

"We agree with the appellate division that acceptance of rent by the landlord, after the acquisition of knowledge by him of the violation of the terms of the lease in subletting without the landlord's written consent constitutes a waiver of the forfeiture. (Cases cited). The same rule applies in respect to the other violations."

A. THE DEFENDANT CONTINUED TO ACCEPT AND CASH ALL RENTAL CHECKS AFTER IT HAD KNOWLEDGE THAT FARM STORE SALES WERE NOT INCLUDED. OF SPECIAL IMPORTANCE IS THE FACT THAT THE DE-

## FENDANT ACCEPTED AND CASHED THE CHECK OF OCTOBER 3, 1949.

In our instant case there is no argument but that the monthly rental checks of \$450.00 per month were paid promptly and satisfactorily up to and including the month of October, 1949. Nor has there been any denial by the defendant that the amounts reported as due the defendant as two per cent of the net retail sales have been paid by the plaintiff and accepted by the defendant. The only amount claimed by the defendant through October 19, 1949, was the sum of \$5161.60, which was the figure accepted as correct as being two per cent of the farm sales. The monthly rental check for the month of October, 1949, was comparable to the other rental checks which the defendant had received from the plaintiff for the premises involved in the lease of December 27, 1943. That check is set forth as plaintiff's Exhibit No. 22 at page 334 of the Record and contains a designation that it is a rent check and also indicates the month in which it was written. Defendant's president testified that he made no objection to the receiving of this October rent. (R 336). It was stipulated that that October rent check was deposited in the Montana Bank and Trust Company on October 5, 1949, as is indicated by plaintiff's Exhibit No. 24. (R 338-339) . The entire examination of this line of evidence indicates that the defendant received and accepted all of the rental checks for the monthly pay-

ments up to October, 1949. In addition thereto it received and accepted the percentage checks which were tendered it. It is particularly noteworthy that the rental check for October, 1949, was cashed on October 5, 1949, just two days after the notice of termination was given to the plaintiff.

In this connection, we believe that defendant's Exhibit No. 26, which is set forth in the Record, beginning at page 348, is in point. That is a letter to the plaintiff from the defendant, dated March 30, 1949. Among other things, that letter identifies two checks and it may be quoted in part as follows:

"We are crediting your account with the checks in question as being simply payments on account."

As far as we can determine from the evidence, subsequent checks were received by the defendant without objection. At any rate, the defendant's president testified as follows regarding the October rental check, which was cashed or deposited on October 5, 1949, (R 333-336).

"Q. Did you ever make any objection to the receiving of the October rent? Did you ever make an objection to receiving this check which is Plaintiff's Exhibit No. 22?

A. No.

Q. After you deposited that check did you ever return the \$450.00?

A. No."

A similar situation was presented in the case of Miller v. Reidy, 260 Pac. 358. In that case there

was a provision in a written lease against sub-letting. The lessee violated that provision and received a notice from the lessor that the lease had been violated and made a demand for possession. The tenant did not surrender possession and continued to pay rent in advance, which the lessors accepted. The Court said that in 260 Pac. at page 360:

“If the assignment were to be regarded as a breach of the lease, the evidence is sufficient to support the finding that the right to take advantage of such breach was waived by the lessors. It is true that in accepting each month’s rent from Reidy, Dr. Miller executed a receipt in the following language:

‘Received from P. M. Reidy \$300 for rent of premises at 1140 So. Figueroa St., for the month of (inserting date) without prejudice to any of my rights under the lease of said premises.’

This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention. For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistency.”

(See also an annotation in 109 A.L.R. at page 1267 and especially at 1287 on the Effect of a Qualified Acceptance, and Batley v. Dewalt, 56 Wash. 431, 105 Pac. 1029).

**B. THE DEFENDANT CONTINUED TO LEASE THE PROPERTY TO THE PLAINTIFF ON WHICH THE FARM STORE SALES WERE MADE AFTER THE DEFENDANT HAD**

KNOWLEDGE THAT IT WAS NOT RECEIVING 2% RENTAL ON SUCH SALES.

The facts of this continued rental have already been gone into at great length above under the discussion of the practical construction of the contract. We feel that it would serve no purpose to go into the facts again at this time. Plaintiff, therefore, submits, that this continued rental comes within the general principles of waiver, elsewhere discussed.

C. PLAINTIFF DEMANDED A PERCENTAGE RENTAL ON FARM STORE SALES UP TO THE DATE OF OCTOBER 19, 1949, WHICH COULD ONLY BE OWING IN THE EVENT THE LEASE OF DECEMBER 27, 1943 WAS STILL IN EFFECT AS OF OCTOBER 19, 1949.

On October 3, 1949, the defendant sent the plaintiff a notice that the lease was terminated, which notice is set forth as Exhibit B in the complaint, (R 23-24) and admitted to be such in the defendant's answer. (R 29) If that notice did not terminate the lease, then the lease was not terminated, for the defendant sent the plaintiff no other purported notice of termination. Thereafter, from October 24th to October 28th, 1949, there were a series of negotiations between the plaintiff's representatives and the defendant's representatives. During these periods of negotiation the figure of \$5161.60 represented two per cent of the farm

sales up to the date of October 19, 1949. Chester McNair, President of defendant, testified as follows in response to questions from his own counsel: (R 300)

“Q. Was there any further discussion in that meeting, Mr. McNair, with reference to the \$5,161.60 representing the percentage on the farm sales?

A. They said, they or one of them said it was correct to the best of their belief, it might vary a dollar or two or a few dollars, and if further search of the records disclose that, it would be rectified, and we said for all intents and purposes we would accept that figure, meaning that figure was authentic and we would also accept that amount in settlement.”

On redirect examination by his own counsel, Mr. McNair further testified: (R 345)

“Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales? A. Yes.

Q. For the period 1947, 1948 and 1949 down to October 19th? A. Yes.”

The date of October 19, 1949 was sixteen days after the date of the purported termination of the lease, October 3, 1949. An examination of all of the evidence pertaining to the negotiations will show that during the period of time from October 24th to October 28th, 1949, the defendant continually demanded the sum of \$5161.60. This represented two per cent of the farm sales down to the date of October 19th, 1949. This sum of \$5161.60 could only be due and owing the defendant in the event

**the lease of December 27th, 1943 was still in effect as of the date of October 19th, 1949.**

#### **MISCELLANEOUS**

The plaintiff herewith abandons number 11 of its Designation of Points to be relied upon on cross-appeal, which is concerned with whether or not the District Court retained jurisdiction for the purpose of determining whether or not the plaintiff was obligated to pay the defendant a reasonable attorney fee.

Designation of Points, numbered 12, which is Specification of Error number 10, is a contention that the judgment of the District Court is erroneous in adjudging that the defendant recover the costs of the action below. Plaintiff contends that if the plaintiff prevails in its appeal that the plaintiff should automatically be relieved from the payment of costs below.

Plaintiff also contends that the tender made by the plaintiff during the negotiations from October 24th to October 28th, 1949 brings the plaintiff within the provisions of Section 93-8609, Revised Codes of Montana 1947, which provides:

**“Cost when a tender is made before suit brought.**  
When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.”

A case in point in interpreting this statute is Luebbens v. Metlen (Montana 1940) 110 Mont. 350, 100 Pac. (2d) 935.

Designation of Point on Cross-Appeal, number 8, was not discussed in this brief. That point was designated by the plaintiff to indicate that despite the refusal of the defendant to accept the plaintiff's tender of March 6, 1951, and despite the appeal of the defendant, the plaintiff at all times has been, and still is, ready, willing and able to pay to the defendant the full amount of principal, interest and costs and to do all that that law and equity requires to prevent a forfeiture and termination of the lease of December 27, 1943.

We respectfully submit that the District Court erred as heretofore assigned and that the judgment appealed from on this cross-appeal should be reversed.

I. W. CHURCH,  
GEORGE G. HARRIS,  
BJARNE JOHNSON,  
CARTER WILLIAMS,  
Great Falls, Montana  
Attorneys for plaintiff-appellee and cross-appellant.

SERVICE admitted this 24th day of August,  
1951.

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Attorneys for Defendant and  
Cross-Appellee,  
McNair Realty Company



No. 12944

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IN THE  
**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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McNAIR REALTY COMPANY, a Corporation,  
Appellant,  
vs.

GAMBLE-SKOGMO, INC., a Corporation,  
Appellee.

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GAMBLE-SKOGMO, INC., a Corporation,  
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**BRIEF OF APPELLEE, McNAIR REALTY COMPANY,  
On Cross Appeal of GAMBLE-SKOGMO, INC.**

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Upon Appeal From the District Court of the United States  
for the District of Montana

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H. C. HALL,  
EDW. C. ALEXANDER,  
HOWARD C. BURTON,  
Great Falls, Montana,  
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McNair Realty Company.

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Filed.....

**FILED**

, 1951.

**SEP 24 1951**

Clerk.



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Great Falls, Montana,  
Attorneys for Appellee,  
McNair Realty Company.

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I.

STATEMENT OF THE CASE

In this portion of our answer brief to the opening brief

of Gamble-Skogmo, Inc., on its appeal herein, we desire to point out to the Court as briefly as possible certain matters which do not appear in Appellant's statement of the case and which we believe have a direct bearing upon the rights of both Appellant and this Appellee on the appeal of Gamble-Skogmo, Inc.

At the outset we desire to point out to the Court the following facts which have a direct bearing upon the right of Gamble-Skogmo, Inc. to appeal from the judgment of the Court entered on March 14th, 1951. (R. pp. 58-60).

By its Findings of Fact (R. pp. 44-55) the lower court found, (a) that Appellant was indebted to Appellee for delinquent rental arising out of net retail sales of the farm unit during the period January 1st, 1947 to December 27th, 1949. (R. pp. 52, 53); (b) that during said period Appellant failed and refused to account to Appellee for such net retail sales, (R. p. 52); (c) that by reason of such defaults the lease was subject to termination by Appellee on October 3rd, 1949 and at all times thereafter. (R. pp. 53, 54); (d) that on October 3rd, 1949, Appellee elected to terminate the lease. (R. p. 54).

By its Conclusions of Law (R. pp. 55-57), the lower court concluded: (1) That Appellant is indebted to Appellee in the amount of \$5,177.70 unpaid rental, (R. p. 55); (2) that Appellee is in default with respect to the covenants of the lease relating to the payment of rental and the quarterly accountings to Appellee, (R. p. 56); (3) that Appellee "is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate

possession of the premises described in said lease *unless the plaintiff shall pay to defendant* within fifteen (15) days after the entry of these Findings and Conclusions and service thereof upon the counsel for the Plaintiff the sums set forth in Conclusions Numbered I and IV hereof, in which event the said plaintiff shall be entitled to be relieved of the termination and forfeiture of said lease which has accrued by reason of the defaults set forth herein," (R. p. 56); (4) "Judgment shall not be entered herein until after the expiration of fifteen (15) days from the entry of these Findings and Conclusions, during which period *plaintiff may, if it so elects,* make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period." (R. p. 57).

The Findings and Conclusions of the lower court were filed and served February 24, 1951. (R. p. 57). On March 6th, 1951, the Appellant made the following tender to Appellee. (R. p. 66):

"To: McNair Realty Company and H. C. Hall and Edw. C. Alexander, its attorneys:

"*Pursuant to and in conformity with* the Findings of Fact and Conclusions of Law heretofore filed in the above-entitled matter, we hand you herewith the sum of Five Thousand Nine Hundred Thirty-one and 18/100 (\$5,931.18) Dollars representing compensation to be paid by Plaintiff to Defendant; the sum of Three Hundred Sixty-two and 25/100 (\$362.25) Dollars representing costs and the further sum of Eleven and 77/100 (\$11.77) Dollars which we calculate to be the interest due in this matter from the date of entry of Findings of Fact and Conclusions of Law up to the present date."

The tender was acknowledged and refused. (R. p. 66).

Thus we find that the Appellant, Gamble-Skogmo, Inc., Appellant here has voluntarily accepted the condition set forth in the Findings and Conclusions, by which it was permitted to continue in possession of the leased property and thus relieved of the termination of the lease which the Court had found. Pursuant to the voluntary acceptance by Appellant of this condition, the Court entered its judgment on March 14th, 1951, as follows, (R. pp. 58-60):

“3. That by tender on March 6th, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease.”

It is believed by the Appellee that by thus acquiescing in the Findings of Fact and Conclusions of Law, and meeting the conditions therein imposed and in such manner procuring a favorable judgment upon the matter of relief from forfeiture of the lease, the Appellant has foreclosed itself from appealing from that judgment, and argument will be presented upon that matter.

While the statement appearing in the brief of Appellant, Gamble-Skogmo, Inc., with reference to the sales of the farm unit or department is extremely sketchy, we do not here intend to impose upon this Court by any lengthy exposition of the evidence. The Findings of the Court

with respect to this matter are supported by the overwhelming weight of the evidence. It appears to Appellee that Finding No. IV of the lower Court, (R. pp. 48-51) is conclusive upon this appeal. That Finding is as follows:

“IV.

“Commencing on or about January 1st, 1947, and continuing to on or about the 23rd day of December, 1949, the plaintiff made net retail sales of farm equipment and other associated items in a total amount of \$258,883.49. With respect to such net retail sales the Court specifically finds that all thereof were ‘had and obtained’ upon the store premises located at 521-523-525 Central Avenue in the City of Great Falls, Montana. Upon this matter the Court finds from the evidence:

That in the operation of its chain of stores the plaintiff sets up various units or departments. From the record herein it appears that there are five of such departments. Apparently some stores have, within their operations, all five departments. Others have one or more. The departments so maintained are as follows:

Unit 1—The department store selling general merchandise;

Unit 2—Food dispensing;

Unit 3—Drug Store;

Unit 4—(Not shown in the record);

Unit 5—Farm implements, parts and repairs.

At the outset the only department placed in operation in Great Falls was Unit 1, the department store. Thereafter Unit 2 was installed and was in operation at the time of trial. Unit 5 was installed on or about January 1st, 1947, and continued in operation until December 23rd, 1949, when it ceased operations.

That an analysis of the methods used in conducting the store operations discloses that the sales made by the Farm Store were as much ‘had and obtained’ upon the premises at 521-523-525 Central Avenue as any other

sales made by the store in the usual course of its business operations. Thus it appears that:

(1) There was but one 'Gambel Store' operating in Great Falls, and there was but one manager of the entire operations of that store.

(2) This one store was divided into three units or departments, each of which was a part of the 'Gamble Store.'

(3) The manager of the 'Gamble Store' received a commission on all sales made in the three departments of the store.

(4) The business office, and the office of the manager was located in the building at 521-523-525 Central Avenue.

(5) In this business office all of the accounting and bookkeeping for the three departments was handled.

(6) All petty cash used by the farm department in making change was supplied by the business office.

(7) All moneys received through sales made in the farm department were deposited with the business office either immediately or at the close of the day's business.

(8) All sales records whether on credit or for cash were kept in the business office.

(9) All credit sales were approved by the business office.

(10) All contracts for conditional sales were approved by the business office.

(11) There was but one bank account maintained for the entire store operation. All moneys received from sales in all departments went into that bank account. All salaries were paid from that bank account.

(12) All other expenses of operating the farm department were paid out of the business office.

(13) The only telephone available was the telephone in the premises at 521-523-525 Central Avenue. There was no other telephone listed for Gamble's Store.

(14) In all advertising, whether for farm implements or otherwise, the prospective customer was directed to go to the store at 521-523-525 Central Avenue, and the only telephone number given was the telephone at the store on Central Avenue.

(15) The advertisements offered and received in evidence all disclose that farm implements were invariably advertised as being for sale at the Central Avenue Store.

(16) Brochures and other pamphlets advertising farm machinery and implements were kept in the Central Avenue Store for the benefit of prospective customers.

(17) When, in response to a newspaper advertisement or otherwise, a customer came into the store and evinced an interest in farm implements he was then directed to the store across the alley.

(18) From the advertisements introduced in evidence as exhibits 8 to 15, inclusive, it appears that farm implements were actually displayed and sold in the 'down-stairs' store of the premises at 521-523-525 Central Avenue. (Exhibits 8 to 15 are certified to this Court.)

(19) Actually a tractor was displayed for sale on the main floor of the Central Avenue premises.

(20) As conclusively appears from the store records introduced in evidence as exhibits 27 and 28, all sales and expenses of departments 1, 2 and 5 were considered as the sales and expenses of 'Gamble's Store'; although for bookkeeping purposes the sales were separated and a bookkeeping charge made against such sales in order 'to see if any particular unit is operating at a loss.'

(21) There was no complete separation of the farm unit or department from the other store operations. Indeed, the operations were so intermingled as to make it impossible to separate one from the other. Thus, while the premises across the alley were called the 'farm store,' nevertheless it has at all times been also used as a warehouse for furniture and other items sold directly from the premises on Central Avenue."

It is true that in 1946 the Appellant expended a considerable sum of money in remodeling the basement and other portions of the leased premises, and also installed new fixtures. (Tr. pp. 100, 102). Under the provisions of the lease the fixtures remain the property of Appellant. (R. p. 18). The remodeling was done by Lessee at its election under the lease, and not by reason of any requirement of Appellee. The lease is explicit with respect to the repairs and alterations to be done by Lessor. (R. pp. 12-14). Under such provisions the Appellee expended approximately \$13,000.00 for the benefit of Appellant. (R. p. 393). How, under any circumstances, the expenditures made by Appellant in 1946 would have any bearing upon its breach of the lease in 1947, 1948 and 1949 is not clear. Certainly, if any benefit accrued to Appellee by reason of such remodeling, a much greater benefit, in the ratio of 98% to 2% accrued to appellee.

The suggestion is made that certain tenders were made by appellant to appellee during negotiations carried on by them during the period October 24 to 28, 1949. (Brief p. 13). Evidence relating to such negotiations all went in under objections made by counsel for appellee that such negotiations, including the so-called tenders were of a compromise nature. (R. p. 298).

Indeed, such objection was made long before the objection appearing at page 298. In its opinion the lower court said with respect to such evidence. (R. pp. 36, 37):

“The negotiations for a compromise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence relating to this attempted com-

promise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of court herein. It would appear from the provisions of the statute and authorities (R. C. M. 1947, 93-2201-3) that evidence of compromise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise it is in evidence that no settlement occurred. (Huffine v. Lincoln, 53 Mont. 474.) In the strict sense of the word there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise."

Aside from the anomalous situation of appellant now relying on evidence that was stricken by the Court on its own objection, it is apparent that, under appellant's theory in the lower Court that there was actually no tenders made at any time prior to March 6th, 1950. (R. pp. 199, 201, 202, 204.)

We desire to point out to the Court that the entire record upon the questions raised in this appeal is not before the Court. Much testimony has been omitted which would give support to the Findings and Conclusions of the lower Court. A considerable part of the record here presented consists of testimony which was objected to and the objection sustained by the lower Court. (R. pp. 36, 37). All of such evidence now appears in the record at the request and designation of the appellant. What purpose it here serves is not apparent.

II.

SUMMARY OF ARGUMENT

1. By making tender to the McNair Realty Company of the sum of \$6,305.20 on March 6th, 1950, (R. p. 66), as required by the Findings and Conclusions of the lower Court, (R. pp. 54, 55, 56, 57), as a condition precedent to relief from the forfeiture and termination of the lease, and thus obtaining a judgment relieving it from such termination, (R. p. 59), the appellant has acquiesced in and accepted such judgment and has voluntarily performed such condition and may not now appeal therefrom, and its appeal herein should be dismissed.

2. The Appellant herein does not specify as error the making by the lower Court of any of its Findings of Fact or Conclusions of Law. Such Findings and Conclusions are the basis for the judgment entered herein. The so-called Specifications of Error in Appellant's brief are in reality a summary of argument with which is intermingled matter which is purely and simply argumentative. (Brief pp. 18-20).

3. The Findings of Fact and Conclusions of Law of the Lower Court with respect to the defaults of the Appellant for failure to account and for failure to pay additional rental due to appellee, and with respect to the termination of the lease, are amply supported by the evidence, are not clearly erroneous, and should not be set aside by this Court.

4. The sales of farm implements and equipment were "had and obtained" upon the premises covered by the lease of December 27th, 1943, and were within the provisions

of the lease requiring a quarterly accounting and payment of 2% of net retail sales as additional rental.

5. The appellee did not accede to a construction of the lease "to the effect that farm sales are not included within the rental and accounting provisions of the lease." In fact, the appellee made demand after demand that appellant account for such sales and pay the rental due thereon. (R. pp. 189, 192, 261, 267, 268, 269, 270, 273, 280, 348, 349).

6. There was no "tender" made by appellant to appellee of delinquent rentals at any time prior to March 6th, 1951. At best there were no offers to pay which were conditioned (a) upon the appellee agreeing that the lease of December 27th, 1943 should be re-instated; or, (b) that payment would be made if the lower Court ordered it.

7. The appellee has not waived its right to claim an accounting for farm unit sales and the 2% rental on farm sales, nor has it waived its right to claim a termination of the lease. The lease expressly provides that appellee has the right to collect rent upon the premises without prejudice to its right to claim a termination of the lease for a breach of the covenants thereof. (R. p. 19). In no event did the appellee accept payment of rent of any kind which became due after its termination of the lease.

8. The appellee did not demand a percentage on sales of the farm unit to October 19, 1949.

### III.

#### ARGUMENT

##### *A. The Appeal Herein Should Be Dismissed.*

By its Findings of Fact the lower Court found and

declared that the appellant had not accounted to the appellee for sales from its farm unit for the period January 1, 1947 to December, 1949, and that it had not paid the 2% additional rental for such sales. It further found that such sales were "had and obtained" upon the premises covered by the lease. It further found that by reason of such defaults the lease had been breached and was subject to termination and that notice of termination had been given. (R. pp. 48-54). The lower Court then concluded, (R. p. 56), that McNair Realty Company "is entitled to a judgment and declaration of this Court that said lease is terminated and forfeited and that defendant is entitled to the immediate possession of the premises described in said lease *unless* plaintiff shall pay to defendant within fifteen (15) days after the entry of these Findings and Conclusions" an amount equal to the delinquent rental plus interest and all court costs.

In its complaint the appellant alleged, (R. p. 6), "that if this Court adjudges that the plaintiff has failed to comply with the provisions of said written lease . . . the plaintiff is ready, willing and able to make full compensation to the defendant for such failure if any exists."

On March 6th, 1951, pursuant to the requirements and conditions of the decree, the appellant tendered to appellee the sum of \$6,305.20. The tender was in writing and recited that it was made "Pursuant to and in conformity with the Findings of Fact and Conclusions of Law heretofore filed in the above entitled matter." (R. p. 66).

Thereafter, on March 14, 1951, judgment was entered by the Court. The judgment recited, (R. p. 58), that "it now appearing to the Court that the plaintiff above named

has tendered to the defendant the sum of \$6,305.20 as required by said Findings and Conclusions as compensation to defendant, other than by way of attorneys' fees,

“NOW, THEREFORE, It Is Hereby Decreed, Adjudged and Declared:

“3. That by the tender on March 6, 1951, of the sum of \$6,305.20, representing unpaid rental plus interest and the costs of this suit, with interest on all of said sums from February 24th, 1951 to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults, and is entitled to remain in possession of the leased premises so long as it continues to perform the terms and covenants of the lease.”

Nowhere in its brief does the appellant suggest that either the judgment or the Findings or Conclusions were erroneous in the above respects. Indeed, the brief claims the right to “relief from forfeiture and termination of that lease,” by reason of the tender of March 6th, 1951. (R. pp. 16, 40-42).

The appellant, after the filing of the Findings of Fact and Conclusions of Law had two courses open to it, viz: (a) It could comply with the condition precedent to relief from forfeiture and pay the money required; (b) it could refuse to comply and appeal to this Court. Certainly, it could not do both for one is wholly inconsistent with the other.

Harrington v. B. A. & P. Ry. Co.,  
39 Mont. 22, 101 Pac. 149;

Conlin v. Southern Pac. Ry. Co.,  
40 Cal. App. 743, 182 Pac. 71.

By the tender of \$6,305.20, in “conformity” with the

Findings and Conclusions, the appellant obtained a judgment relieving it from the termination of the lease and permitting it to remain in possession of the leased premises. (R. p. 59). Having performed the condition and benefited thereby it may not now appeal.

3 C. J. 666, citing:

Bashore v. Tulare County,  
152 Cal. 1, 91 Pac. 801;

Evans v. Noble,  
..... Iowa ....., 107 N. W. 1105;

Buena Vista County v. Iowa R. Co.,  
55 Iowa 157, 7 N. W. 474;

Harrington v. B. A. & P. Ry. Co.,  
39 Mont. 22, 101 Pac. 149;

Kraus v. Kraus,  
74 N. J. Eq. 417, 70 Atl. 305;

Wilson v. All,  
86 S. C. 586, 68 S. E. 824;

Lynchburg Tel. Co. v. Booker,  
103 Va. 594, 50 S. E. 148;

Flanders v. Merrimac,  
44 Wis. 621.

As was pointed out by the Supreme Court of Iowa, in the Buena Vista County case, *supra*, (7 N. W. 474):

“The plaintiff cannot accept the benefits of the judgment, so far as favorable to it, and, at the same time prosecute an appeal from the judgment.”

For the purpose of this appeal the tender made by the appellant was the equivalent of payment, for by that tender the appellant benefited to the same extent as though the tender had been accepted. Had the appellee accepted the payment tendered to it by the appellant it seems elementary that there could be no appeal from the judgment

by Gamble-Skogmo because the case would then have become moot. Certainly the same result must follow here where the tender is equivalent to payment. The delinquent rentals have been paid and appellant is in possession. It is out of the farm implement business (R. p. 83). The appeal of Gamble-Skogmo herein should be dismissed.

United States v. Alaska Steamship Co.,  
253 U. S. 113, 64 L. Ed. 808;

Borchard, Declaratory Judgments, p. 61.

*B. The Appellant Does not Specify as Errors the Making of any of the Findings or Conclusions.*

As we have heretofore pointed out there are no specifications of error set forth by the appellant with respect to the Findings of Fact and Conclusions of Law. As a matter of fact, the so-called specifications of error appear to be more in the nature of a Summary of Argument than anything else.

Rule 20 (d) of this Court provides:

“In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.”

The judgment and decree here involved is based upon the Findings of Fact and the Conclusions of Law. The Findings are based upon the evidence and the Conclusions upon the Findings. If the lower Court committed no error in making its Findings of Fact and Conclusions of Law then, if the Judgment follows them there can be no error in the Judgment.

Western Securities Co. v. Spiro,  
62 Utah 823, 221 Pac. 856, 859;

Esselstyn v. Holmes,  
42 Mont. 507, 515, 114 Pac. 118.

In United States v. Cushman, CCA 9, 136 Fed. (2d) 815, it was held that under rule 20 of this Court, where appellant did not specify the trial court's findings as error, the question of the sufficiency of the evidence to support the findings was not raised.

See also:

Simons v. Davidson Brick Co.,  
CCA 9, 106 Fed. (2d) 518.

Clearly so-called specifications 3, 4, 5, 7 and 8 are not specifications of error at all under the rule. So-called specification 9 appears to be directed at the sustaining by the Court in its opinion, (R. pp. 36, 37), of an objection to the introduction of evidence made by counsel for appellant himself. This leaves only specifications 1, 2 and 6 which need to be considered at all. Such specifications relate only to the judgment; are general in their nature; and, simply state that the judgment is erroneous "in so far" as it adjudges various matters. Such specifications are entirely improper.

See:

Humphreys Gold Corp. v. Lewis,  
CCA 9, 90 Fed. (2d) 896.

Under such circumstances it would appear that there is nothing here presented for the review of this Court.  
*C. The Findings of Fact and Conclusions of Law are amply supported by the evidence; are not clearly erroneous and should not be set aside by this Court.*

In this and the following subdivisions of this brief, we shall assume, for the purposes of argument, that the ap-

pellant, Gamble-Skogmo, has the right to appeal from the judgment entered on March 14th, 1951, notwithstanding its tender of the money required by that judgment to be paid. We shall also assume that the specifications of error set forth in Appellant's brief are sufficient to permit a consideration of the evidence by this Court. At the outset we believe that it should be called to the attention of the Court that all of the evidence bearing upon the matters here urged by the appellant is not contained in the record. However, that may be, the evidence contained in the record amply sustains the findings, conclusions and judgment in so far as this appeal is concerned.

Rule 52 (a) of the Rules of Civil Procedure provides as follows:

“Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

A finding of fact by the District Court is not clearly erroneous so as to justify the Court of Appeals in setting it aside unless it is unsupported by substantial evidence, is contrary to the clear weight of the evidence, or is induced by an erroneous view of the law.

Morris v. Williams,  
CCA 8, 149 Fed. (2d) 703;

West v. Conrad,  
CCA 9, 182 Fed. (2d) 255;

Western Union Tel. Co. v. Bromberg,  
CCA 9, 143 Fed. (2d) 288;

Gates v. General Casualty Co.,  
CCA 9, 120 Fed. (2d) 925.

For the primary question to be solved by the lower

Court in its findings of fact and conclusions of law was whether the sales made in the farm unit or department were "had and obtained" on the leased premises, and were to be accounted for to McNair Realty Company and included in the percentage rental. In finding No. IV, (R. pp. 48-51), the Court detailed the various transactions that occurred directly and indirectly in the leased premises. There is no conflict of evidence that such was the case. In its brief counsel for appellant recognized this to be the situation. On page 10 of its brief appellant's position is stated as follows:

"Part of the activities involved in the sale of farm implements and equipment was carried on at the farm store, and part of the activities involved in such sales were carried on in the department store. It is the plaintiff's contention that *not enough* of those activities were carried on on the department store premises so that the sale of farm equipment came within the provisions of the percentage rental in the lease as being 'had and obtained' on the demised premises."

Again, on pages 21 and 23, we find the following statement:

"The farm store activities which took place on the demised premises were so few and of such a nature, that they did not affect the income producing activities which the parties intended should become a basis of calculation of net retail sales."

On page 29 there appears the following:

"We realize that the District Court made a Finding of Fact that the sales made by the farm store were had and obtained upon the demised premises. In fact, the District Court listed various activities of the farm store, which took place on the department store premises. It would be possible for us at this time to list an equally

lengthy number of activities which took place off the department store premises."

Thus, the appellant recognizes that various of the "activities" in connection with the sales of the farm unit or department took place on the leased premises. It takes the position that there were "not enough" of those activities. How much is enough? Appellant seeks to have the lower Court's judgment upon that question set aside in favor of its own. It seeks to have this Court substitute its judgment for that of the District Judge. This may not be done.

Pacific Portland Cement Co. v. Food Machinery & Co. Corp., CCA 9 178, Fed. (2d) 541;

Manley v. Pacific M. & T. Co.,  
79 Cal. App. 641, 250 Pac. 710, 713.

We submit that under the evidence and under the theory of appellant, as above set forth, this Court cannot say that it is "left with the definite and firm conviction that a mistake has been committed."

United States v. U. S. Gypsum Co.,  
333 U. S. 364, 92 L. Ed. 746.

*D. The Sales of Farm Implements and Equipment were had and obtained on the leased premises.*

It would seem that Finding No. IV of the Lower Court is a complete answer to the argument of counsel for appellant which appears on pages 23 to 32 of Appellant's brief. However, we shall here, as briefly as possible, address ourselves to the argument there presented.

The present action assumes an ambiguity or uncertainty in the lease between the parties. The evidence is that the lease was prepared entirely by the appellant upon its own

printed form. The provisions of the lease must, therefore, be construed most strongly against the appellant.

Blankenship v. Decker,  
34 Mont. 292, 85 Pac. 1035;

Lyon v. Daly C. M. & S. Co.,  
46 Mont. 108, 126 Pac. 931;

McDonald v. N. B. Ass'n.,  
113 Mont. 595, 131 Pac. (2d) 479;

Letz v. Lampen,  
110 Mont. 477, 104 Pac. (2d) 4.

Such is the rule in this Circuit,

N. P. Ry. Co. v. Twohy Bros. Co.,  
(CCAA) 95 Fed. (2d) 220, 223;

and in all Federal Courts.

17 C. J. S. p. 751, note 98.

The purpose of the lease is set forth as follows:

"For the purpose of selling merchandise at retail and other business that may be conveniently carried on in connection therewith."

Upon that basis the appellant agreed to pay rental to appellee as follows:

"A rental at the rate of Fifty Four Hundred and no/100 Dollars (\$5400.00) per annum payable in equal monthly installments of \$450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, plus two per cent (2%) on all net retail sales over Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) per lease year, had and obtained on the above described premises. No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble stores.

"Should Lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to Lessor. Additional

rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and no/100 Dollars (\$270,000.00) or on any general wholesale business done as provided for."

That the word "merchandise" comprehends the sale of farm implements and repairs seems too clear for argument.

57 C. J. S. p. 1057 and cases cited.

A sale is the transfer of property for a valuable consideration.

R. C. M. 1947, sec. 74-101.

The location of the property sold is immaterial. Indeed, it may not even be in existence.

The word "had" appears to be the equivalent of "obtained" or "acquired."

Webster New Int. Dictionary.

The word "obtained" apparently means primarily to acquire by effort.

Webster New Int. Dictionary.

Ex parte Parker, 11 Neb. 309, 9 N. W. 33;

State v. Miller, 53 Kan. 324, 36 Pac. 751.

The words "on the above described premises" means the building and ground described in the lease.

Under such a lease the obligations of the lessee is plain. In the case of *Selber Bros. v. Newstadt's Shoe Stores*, 194 La. 654, 14 So. (2d) 10, the Court said:

"Defendant (lessee) was required to conduct its operations in plaintiff's premises for the mutual benefit of the parties to the contract, and in a manner consistent with good business principles in order that its lessor would realize the largest possible amount of rent over and above the stipulated minimum of \$200.00 per month. The implied obligation of the lease demanded

this; and the plaintiff (lessor) was entitled to and did rely on a performance of that kind."

Such then was the obligation of the plaintiff under the present lease at the time it took possession of the leased premises and at all times thereafter until the lease was terminated.

The general rule under leases such as is here presented is stated in 52 C. J. S. sec. 502 (b), pp. 284, 285, as follows:

"He (the tenant) cannot by ceasing to operate, or by changing the nature of his business, or by diverting his business to another store which he owns or by moving some departments of the business to other premises escape liability for rent based on the percentage of his profits or sales by paying the minimum amount stipulated."

Citing:

Mayfair Corp. v. Bessemer Properties,  
150 Fla. 132, 7 So. (2d) 342;

Selber Bros. v. Shoe Stores,  
194 La. 654, 194 So. 579;

Goldberg Corp. v. Levy,  
9 N. Y. S. (2d) 304;

Dunham & Co. v. Realty Co.,  
134 N. J. Eq. 237, 35 Atl. (2d) 40;

Cissna Loan Co v. Baron,  
149 Wash. 386, 270 Pac. 1022;

Seggebruch v. Stosor,  
309 Ill. App. 385, 33 N. E. (2d) 159.

The facts in the case of *Cissna Loan Co. v. Baron*, (Wash.) 270 Pac. 1022, Supra, are very similar to those here presented. In that case the plaintiff was the owner of "The Fair Department Store." It sold its stock of

goods as a going concern to the defendant and leased the building in which the store was located to the defendant. As rental the defendant agreed to pay to plaintiff "2½ per cent of the gross sales of said department store business conducted and maintained by second part *in said building* during the preceding calendar month." Thereafter the defendant leased the second floor of an adjacent building, opened the wall between the two buildings and moved several departments of the store into the adjacent building. Defendant refused to pay the 2½ per cent on sales made from such departments. Plaintiff sued for such percentage. In upholding a judgment for the plaintiff the Supreme Court of Washington said:

"The monthly rental to accrue to respondent is, according to the lease, to be computed at a percentage of the gross sales of the department store business conducted and maintained by appellant '*in said building*' during the preceding calendar month. Appellant contends that the lease is to be construed in favor of the lessee and against the lessor, *Gates v. Hutchinson Investment Co.*, 88 Wash. 522, 153 P. 322; *Salzer v. Manfredi*, 114 Wash. 666, 195 P. 1046; and that consequently it must be held that respondent is not entitled to any percentage of the gross sales of merchandise sold in the McArthur building. It appears that during the month of April, 1927, the gross sales of merchandise from respondent's building amounted to \$4,572.83, and from the McArthur building to \$2,928.70; for the month of May the sales from respondent's building amounted to \$5,335.25, and from the McArthur building to \$2,856.80. It appears from these figures that the two departments moved to the McArthur building were important departments, and that the sales therefrom amounted to a considerable portion of the total sales made by the department store. When appellant moved these departments into the McArthur building, appellant

somewhat enlarged the space on the balcony theretofore devoted to the business office of the store, a necessary part of the business, but a department which did not engage in the selling of merchandise.

"In our opinion the trial court was correct in giving the instruction of which the appellant complains. Respondent turned over to appellant a going business, a department store, including the two important departments now located in the McArthur building. Customers now obtain access to these departments by going through respondent's building, using the stairs or elevator therein, the goods are displayed in respondent's show windows, and the entire business is administered and 'conducted' within the demised premises.

"Appellant is conducting one business only, that of 'The Fair Department Store,' and is bound to pay as rent for respondent's building the agreed percentage of the gross sales of the 'said department store business.' Appellant contends that the words 'in said building' relieve him from paying any percentage on the gross sales made from the second floor of the adjoining building; but it is perfectly clear that at least a considerable portion of the 'business' of selling the goods contained in the McArthur building is actually conducted in respondent's building. Respondent sold to appellant a business, a going department store; he is to receive under his agreement with appellant, as rent for his building, a percentage of the gross sales of the 'business.' The entire business administration, the advertising, the going to and fro of the patrons of the store, is conducted in respondent's building, and we are clearly of the opinion that respondent is entitled to receive the agreed percentage on the gross sales made from the departments located in the McArthur building."

The facts of the above case with the uncontradicted facts here presented are surprisingly similar. A comparative statement is as follows:

*Cissna Loan Co. Case*

1. Rental provided for payment of  $2\frac{1}{2}$  per cent of gross sales of department store business conducted and maintained by lessee "in said building."
2. Tenant leased space in adjacent building for use of certain departments of store.
3. The entire business was conducted as "Fair Department Store."
4. The entire business administration was conducted in lessor's building.
5. All advertising directed patrons to lessor's building.
6. Patrons came to lessor's building and were there directed to departments in adjacent building.

*McNair Realty Co. Case*

1. Rental provided for payment of minimum rental plus 2% of net retail sales above \$270,-000.00 had and obtained on the above described premises.
2. Tenant leased lot and building across alley for use as warehouse and thereafter installed farm department therein.
3. The entire business was conducted as "Gamble Store."
4. The entire business administration was conducted in 521-523-525 Central Avenue.
5. All advertising directed patrons to 521-523-525 Central Avenue.
6. Patrons came to 521-523-525 Central Avenue and were directed to farm department across alley.
7. There was but one telephone—that at 521-523-525 Central Avenue.
8. The money from all sales came to the business office at 521-523-525 Central Avenue.

9. All credit sales were approved and concluded at the business office in 521 - 523 - 525 Central Avenue.
10. The farm unit was in every way treated as a department of Gamble's Store.
11. Farm implements were actually displayed and sold in the Central Avenue Store.
12. The entire business was under the supervision of one manager.

There can be no question here but that under the authorities the appellee was clearly entitled to a percentage of 2% on all farm sales.

To avoid the impact of the decisions as applied to the undisputed facts, counsel for the appellant attempt to advance the following theories:

- (a) A farm department was not contemplated at the time of the execution of the lease.

There is, of course, testimony in the record that the appellant did not contemplate selling farm machinery, implements and repairs when the lease between appellant and appellee was negotiated or on December 27th, 1943, when it was executed. Indeed, it appears that during that period the appellant was nowhere engaged in the sale of such merchandise and did not have as a part of its operations a farm department. However, we are unable to see exactly what bearing these facts have upon the question

before the Court. Farm implements and repairs are merchandise beyond question. In the course of the business of the appellant the sale of such merchandise was treated exactly the same as the sale of any other merchandise. The retail sales of farm implements and repairs was reported by the Great Falls store in exactly the same fashion as the sale of dry goods or washing machines. Such sales were carried into the store records which were introduced in evidence as Exhibits 27 and 28 exactly the same as any other sales.

The evidence is that prior to the execution of the lease there was no discussion regarding the sale of any particular items and no discussion with respect to the operation of a lunch counter. (R. pp. 291, 292). Both parties correctly assumed that the percentage rental should be based upon the net retail sales of all merchandise. This was recognized by the "General Counsel" for the appellant in his letter to defendant dated November 15th, 1948, in which he gives, as the only reason for not including farm sales in figuring the percentage that "the farm store is entirely a separate unit, it carries its own inventory, none of which is located on your store property which we are corresponding about and, therefore, such sales do not constitute sales on the leased premises covered by our store building lease and for that reason there is no point in reporting the sales of the farm store to you." (R. p. 280).

(b) It was physically impossible to operate the farm store on the demised premises.

In a discussion of this phase of appellant's argument,

we must first ascertain the meaning of the word "operate." In the case of *In re Owl Drug Co.*, (D. C. Nev.), 21 Fed. Suppl. 907, 910, the Court said:

"To 'operate' means to put into, or to continue in operation or activity, to manage, to conduct, to carry out or through. This is both the ordinary and the legal definition of the word. See Webster's New International Dictionary; 6 Words and Phrases, First Series (1904) pp. 4989 et seq.; 3 Words and Phrases, Second Series (1914) pp. 743 et seq.; 5 Words and Phrases, Third Series (1929) pp. 629 et seq.; 2 Words and Phrases, Fourth Series (1933) pp. 864 et seq. The new Shorter Oxford English Dictionary defines it as follows: 'To direct the working of, to manage, conduct, work (a railway, business, etc.); to carry out, direct to an end (an undertaking, etc.); chiefly U. S. 1880.' Volume II, p. 1374.

"The operation of a business implies its conduct and management not sporadically, but continuously over a definite period of time, with one aim—profit making."

That the farm unit business and management was conducted from the leased premises is beyond question. That its income was the Gamble-Stores income is conceded. That its profits were credited to and its losses absorbed by the general operations is clear. (See Finding No. IV, R. pp. 48-51).

If counsel means that it was physically impossible to have the farm merchandise on display in the department store, then our answer is that such physical presumes is not necessary. In many businesses sales are by catalog or by sample. The actual merchandise is not on display and perhaps is not in existence. Nevertheless a business is being conducted or operated, sales made and profits accrued. But, actually, farm merchandise was displayed in

the department store premises. (R. pp. 353, 357). And see the advertisements set forth in exhibits 8 to 15, inclusive, which have been certified to this Court.

E. *The Appellee did not accede to a construction of the lease to the effect that farm sales were not to be included within the rental and accounting provisions of the lease.*

Counsel for appellant appear to argue, (Brief, pp. 36 to 40) that appellee acceded to such a construction of the lease because it leased the First Avenue Warehouse property on a flat rental basis.

This assertion, of course, simply begs the whole question. The First Avenue North property was rented by appellant from the appellee long before any "farm department" was set up or contemplated by the appellant. The property was leased for *storage and warehouse purposes* in conjunction with the operation of the store on Central Avenue. It appears at the outset to have been used for just that purpose and no other. Indeed, up until the time of the trial the warehouse was being used for the storage of furniture and other items which were being sold in the Central Avenue store. (R. p. 116). So long as no merchandise was being sold from the warehouse or lot in connection with appellant's store operations in Great Falls there could be no net retail sales or wholesale sales upon which a rental could be figured, and the minimum rental of \$60.00 or \$90.00 per month applied. When, however, the appellant departed from a mere storage of merchandise and set up a store department on the First Avenue property through which large quantities of merchandise was sold a wholly different situation arose.

Counsel for appellant would hardly have the temerity to suggest that it would have the right to move all of its washing machines, radios, and hardware out to the First Avenue property, set up a Unit 6 as a hardware and furniture department, sell such merchandise, as the farm implements were sold, as a part and parcel of the general store operations, and not report such sales under the percentage agreement. We can see no difference between such an assumed situation and the methods used by the appellant in its operation of the farm department. Certainly under the facts hereinbefore detailed with reference to such operations there can be no difference in law.

How the acceptance of a flat rental upon property rented for warehouse and storage purposes could act as a construction or interpretation of the lease of December 27th, 1943 is not clear. There is no evidence in the record that appellee knew on June 8, 1948, when it wrote appellant increasing the flat rental on the warehouse property, (R. p. 324), that appellant was not accounting for its farm unit sales. The constant reiterated demands made by the appellee for an accounting of farm unit sales emphatically show that appellee never acceded to appellant's so-called construction of the lease. (See Exhibit 3, R. p. 189; Exhibit 4, R. p. 192; Exhibit 16, R. pp. 261, 267, 268, 269, 270, 273, 280; Exhibit 26, R. pp. 348, 349).

Finally, it is suggested by counsel for the appellant, (Brief, pp. 34 to 36) that the appellant placed a "practical construction" on the lease with respect to the payment of a percentage on the sales of the farm department. This theory is advanced because Mr. Hill, the real estate man

for appellant, testified that "the general Company policy was to establish all of those farm stores as separate stores." (R. p. 169). There is, of course, no evidence that this "policy" was ever discussed with or agreed to by the appellee prior to December 27th, 1943, or at any time. What counsel overlooks entirely is that the First Avenue property was never leased as a place for a farm store, *but was leased purely and simply as a warehouse for storage purposes only.* The appellant had no Unit 5 or farm department in Great Falls at that time. (R. p. 168). How then could there be any policy on the part of the appellant with respect to farm stores which could be applied to the lease of December 27th, 1943, or the renting of the First Avenue property in 1946? Furthermore, a general policy of the company, could hardly amount to a "practical construction" of the lease of December 27th, 1943 when, (a) the appellant was not then in the farm implement business at all, (R. p. 168), and (b) the policy, if any, was never communicated to or agreed to by the appellee. (R. p. 367).

Counsel for the appellant appear to argue that because all of the rentals paid in connection with the storage and sales of farm implements plus 2% on sales would amount to 4.68% of net sales this Court should hold that the sales in department 5 are not within the percentage arrangement. The appellee, of course, has no control over property rented by appellant for unloading farm machinery from railroad cars or for property used in setting up such machinery or storing it. If the rental paid is considered from a storewide standpoint, it would amount to not much more than 2%. There is no reason why it should

not be. The warehouse was used for the storage of furniture, tires and other items which should carry a part of the burden of any flat rental. These items were all a part of the stock of Department 1. For bookkeeping purposes that department should be charged therefor. It must be remembered that all the testimony regarding costs, rentals, profits, et cetera, with respect to Department 5 is merely bookkeeping testimony and has little or no regard to actual facts. (R. p. 132).

*F. There was no tender of delinquent rentals at any time prior to March 6th, 1951.*

There was here no "tender of full compensation." There was a compromise offer of \$5,161.60 made during the negotiations of October 24 to 28, 1949, (R. pp. 198-202) but no money was paid and the offer was not kept good.

Section 58-423 Revised Codes of Montana, 1947, provides:

"An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

This statute was not followed.

The so-called "tender" of the plaintiff had conditions attached to it—that the lease of December 27, 1943, was to continue in effect. (R. pp. 200, 201). Such an offer is not a tender.

· Advance Thresher Co. v. Hess,  
85 Mont. 293, 301, 279 Pac. 236.

It is true that Hill testified that appellant was "ready, willing and able to make full compensation for that rent with interest, costs and damages." (R. p. 179).

His authority for making such a broad offer would appear to be problematical. He testified, (R. pp. 179, 180):

"Q. May I see your authority for making that statement, Mr. Hill, please?

"A. My authority?

"Q. Yes.

"A. I can't show you anything in writing, Mr. Hall.

"Q. Well who authorized you to make that statement?

"A. Gamble-Skogmo, Inc.

"Q. And who in that corporation authorized you?

"A. W. P. Berghuis, E. Pennock, W. J. Larson.

"Q. Mr. Berghuis is general counsel of the corporation, is he not?

"A. That is correct.

"Q. And who is Mr. Pennock?

"A. He is one of the Vice Presidents.

"Q. And who is the other?

"A. W. J. Larson.

"Q. Yes.

"A. He is also one of the Vice Presidents in charge of operations.

"Q. But you have nothing in writing from the corporation in connection with that matter?

"A. No, I do not.

"Q. That is purely oral statements made by these officers to you?

"A. Yes, sir, that is correct."

Even assuming Hill's authority his statement did not constitute a tender, but at most was an offer to compensate in the event of an adverse decision. (62 C. J. 654,

655). No money was tendered or deposited in Court prior to March 6, 1951, nor was any bond given to show appellant's good faith. The facts of the matter are that in so far as appellant is concerned there has been a callous indifference to the rights of appellee and an entire lack of good faith or equity on its part.

G. *The Appellee did not waive its right to an accounting of farm unit sales or to payment of the 2% rental thereon, or to its right to terminate the lease.*

It is next suggested by counsel for the appellant that by reason of appellee's acceptance of the percentage rental without the inclusion therein of the percentage on sales from the farm department it is now precluded from claiming that it is entitled to any percentage on such latter sales. This might be true if the appellee had accepted the payments made by appellant as payment in full. That the appellee at no time did so is clear from the evidence.

During the summer of 1948 the appellee, for the first time learned that sales from the farm department were not being included in the accounts rendered by appellant and that such sales were not being used in calculating the percentage due appellee. The President of appellee learned the above quite through accident and in a discussion with Dale Cockayne, the manager for appellant. (R. p. 289). Cockayne, on or about July 6th, 1948, furnished appellee with figures showing retail sales for the period March 1st to May 31st, 1948. (R. p. 257). These figures disclosed total sales of \$239,112.29, and farm sales of \$64,398.63, but the figures finally reported by appellant for such period, after many demands and complaints from defendant, was only \$169,454.01. (R. p. 264).

On July 17th, 1948, the matter of farm sales was called to appellant's attention by appellee. (R. pp. 260, 261). This was ignored. On September 4th, 1948, it was again called to appellant's attention, (R. p. 267), and again on September 20th, 1948. (R. p. 268). Finally on September 27th, 1948, appellant replied. (R. p. 269). Appellee answered on September 29th, 1948. (R. p. 190).

Again, on October 28th, 1948, the matter of farm sales was referred to by appellee, (R. p. 273) and was ignored by appellant's General Counsel. (R. pp. 275-278). Again, on November 9th, 1948, appellee wrote concerning the matter. (R. pp. 191-193). This letter was answered on November 15, 1948. (R. pp. 279, 280). Finally, on March 30, 1949, the appellee wrote appellant as follows, (R. p. 348):

"This will acknowledge your two letters of December 30, 1948, and March 25, 1949, enclosing checks for \$2,862.07 and \$2,017.30, respectively.

"These letters purport to be sales reports for certain quarterly periods. As letters they are interesting but they scarcely constitute reports such as we are entitled to.

"Furthermore, the total figures contained therein are extremely disappointing. We still have to point out to you that no report is made as to so-called farm sales and that if such figures have been included in the totals given in your letters then these totals are increasingly disappointing.

"We are crediting your account with the checks in question as being simply payments on account.

"As we have done before, we here and now make formal demand upon you for fully certified sales statements, and for the additional sums due as shown by such statements.

"If these are not forthcoming, properly made up, showing your sales by departments for the periods in question, on or before May 1st, next, we will turn the matter over to our attorneys with instructions to them to ask the courts to terminate your lease."

There was no response of any kind to this letter.

Thus, during the period July 17th, 1948 to March 30th, 1949, appellee called this matter to appellant's attention on seven different occasions, and finally advised the appellant on March 30th, 1949, that unless proper accountings, including farm sales, were submitted a termination of the lease would be requested. Demand was made for the payment of the additional sums due. (R. p. 348). There was no response, and on October 3rd, 1949, the lease was terminated. How, under such circumstances, there could be a waiver is not clear. There certainly was no waiver before July, 1948, for appellee did not know that appellant was omitting farm sales in its accountings to appellee. Certainly the appellee was consistent in its demands thereafter. The amount due the appellee amounting to 2% of the sales made in the farm department was a certain and liquidated amount known to the last cent by the appellant at all times through its daily reports. There was at no time any dispute as to the amount due the appellee. The dispute, if it can be called such, was whether in any event appellee was entitled to a percentage on the farm sales. There was here no waiver on the part of the appellee of its right to claim such percentage. The case of *In re Diversey Bldg. Corp.*, 90 Fed. (2d) 703, is cited by counsel for plaintiff upon the theory of waiver. *But in that case the lessor had knowledge of the failure to pay and*

*had continued to deal with the lessee for nearly three years thereafter without objection.* (Appellee's Brief, p. 33). Such emphatically is *not* the situation here. There was here first a lack of knowledge and thereafter continuous objections.

The lease required a quarterly accounting of (a) net retail sales; and (b) wholesale sales.

Net retail sales "are gross retail sales less returned merchandise or returned merchandise sold on contract." (R. p. 95).

No such accounting was ever made by the appellant to appellee, and complaints on the part of the appellee were almost continuous. (R. pp. 221-275).

The first lease year commenced March 1, 1944. There was no accounting at all until November 28, 1944, (R. p. 222) and then only on demand of appellee. (R. p. 221). A statement for the three quarters ending August 31, 1944 was made January 15, 1945. (R. p. 226). The appellant maintained that the quarterly accounts related only to wholesale sales, (R. p. 228) and appellee complained about that construction of the lease under date of June 11, 1945, (R. p. 228), and again requested a quarterly accounting, (R. p. 229). A statement was finally sent on July 2, 1945. (R. p. 230).

For the first two lease years ending February 28, 1946, the plaintiff reported sales under \$270,000.00 for each year so that the percentage clause did not apply. (R. pp. 230, 233).

Demand was made on July 12, 1946, for the first quarterly accounting for the quarter ending May 31, 1946.

(R. p. 238). A statement was finally sent July 26, 1946, (R. p. 239), but no check was enclosed. (R. p. 241). Another request was made for an accounting for the quarter ending August 31, 1946. (R. p. 243). This was forthcoming November 1st, 1946. (R. p. 244). The statement of sales for the quarter ending November 30, 1946, was sent January 20, 1947. (R. p. 244). An overall statement for 1946 to March 1, 1947, was sent April 22, 1947. (R. p. 245). On January 5, 1948, demand was made for the quarterly accounting for the quarter ending November, 1947. (R. p. 251). This report finally came January 21, 1948. (R. p. 253). On July 6, 1948, July 12, 1948, and August 3rd, 1948, the appellant sent false reports covering sales concerning which appellee emphatically complained, (R. pp. 256-262). Finally, on March 30, 1949, appellee wrote appellant as hereinbefore set forth.

Under the facts it is difficult to see how it is possible for appellant to take the position that through inaction the appellee had waived its right to a quarterly accounting. Such a position simply does not have any basis in fact. The appellant throughout the period March 1, 1944 to October 1, 1949, simply ignored appellee's demands and in a high handed manner delayed reports indefinitely and made absolutely no accounting to the appellee. Counsel for appellant suggest that the appellee could have gone to the store records and obtained its information. But the lease does not require the appellee to carry this burden. A plain obligation was written into the lease by the appellant requiring appellant to furnish quarterly to appellee an accounting of retail and wholesale sales. This it refused

to do and it must take the consequences of that refusal.

We are not entirely clear as to just what appellant's theory is with respect to the argument appearing on pages 46 and 47 of its brief. The appellee did accept, under protest, the checks sent to it by appellant, but only as part payment of the rental due. The appellant was in possession of the Central Avenue property and the First Avenue property. There was no default claimed so far as the rental of the First Avenue property was concerned. That property was rented for storage purposes and was used for that purpose up to the time of trial. The default was in not accounting for or paying the full amount due on the percentage of sales under the lease of December 27th, 1943. Certainly acceptance, under protest, of a part of the rental due, does not constitute a waiver of the default in not accounting for or paying the full amount unless there is an executed agreement to that effect.

Section 58-501, Revised Codes of Montana, 1947, provides:

“An accord is an *agreement* to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.”

See:

Nelson v. Young,  
70 Mont. 112, 117, 224 Pac. 237.

There was no such agreement here and there was no waiver.

Of course, the decision cited by counsel for appellant is not in point here. The case of Woppard v. Schaffer Stores Company, Inc., 272 N. Y. 304, 5 N. E. (2d) 829, 109 A. L. R. 1262 holds that “the acceptance of rent by the

landlord, after the acquisition of knowledge by him of a violation of the terms of the lease in subletting without the landlord's written consent, constitutes a waiver of the forfeiture."

With such holding we have no quarrel. But here the plaintiff has failed to pay more than \$5,100.00 due as percentage rental for the property occupied by it. Part of the rental has been paid and accepted "on account" under protest. In the Woppard case the full rent due was paid and accepted. That is not the situation here. If counsel's theory were correct then the minimum rental of \$450.00 could have been paid by appellant and if the checks were accepted "on account" and under protest, nevertheless all that appellee could do would be to sue for the delinquent rental. But that is not what paragraph 16 of the lease says in clear and emphatic language.

In the case of *Title & Trust Co. v. Durkheimer Inv. Co.*, (Ore.) 63 Pac. (2d) 909, 915, the court said:

"A covenant to pay rent is a continuing one, to which the doctrine of waiver does not apply. The lessor of real property will not be estopped to claim the right of possession of the premises for nonpayment of rent simply because he permits defaults to be made and to continue for a time as to such payments. *Francis Bros. v. Schallberger*, 137 Or. 529, 536, 3 P. (2d) 530, 83 A. L. R. 108; *Jones, Landlord & Tenant*, §§ 499, 500; 1 *Underhill, Landlord & Tenant*, p. 649."

The minimum rental was due on October 1, 1949. On March 30th, 1949, appellee had finally advised appellant that future rent checks would be accepted only on account and that appellee was going to take steps to terminate the lease. (R. p. 348). The payment of \$450.00 by appellant

on October 3rd did not make up the delinquency and was not intended to do so.

In re Wil-low Cafeterias,  
94 Fed. (2d) 306, 309;

Sproul v. Help Yourself Store Co.,  
16 Fed. (2d) 554.

It must be further borne in mind that the lease specifically provides that the right to terminate is "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants."

This clause can only mean that appellee may demand, sue for, recover and accept delinquent rentals or payment on rentals without prejudice to its right to terminate.

In the case of Miller v. Reidy, 260 Pac. 358, relied upon by counsel for appellant in their brief, (p. 49), there was a full payment of the "rents specified in the lease." Not so here under the evidence. Again, we have a case where there was a breach of a covenant against subletting. Such a covenant is not a continuing obligation such as we have here.

There was and is no waiver of the right to terminate the lease.

*H. The Appellee did not demand payment of a percentage on farm unit sales to October 19th, 1949.*

On page 52 of appellant's brief appears the following statement:

"On examination of all of the evidence pertaining to the negotiations will show that during the period of time from October 24th to October 28th, 1949, the defendant continually demanded the sum of \$5,161.60."

This statement requires a discussion of what took place between October 24th and October 28th, 1949. On October

25th, 1949, Carter Williams, representing the appellant, offered to pay to appellee 1% of all farm sales to date. This was refused. In a discussion it was stated by those representing the appellant that 2% of the farm sales, as of October 19th, 1949, amounted to \$5,161.60, and this amount was offered and accepted as the correct amount. Chester McNair testified, (R. p. 345):

“Q. Now do I understand, Mr. McNair, at no time during the conferences held between you and Mr. Hill that there was any agreement on his part to pay this \$5,161.60?

“A. He agreed to pay that.

“Q. Well was that an actual agreement to pay or was it a tacit agreement to pay, something you understood?

“A. I know that was agreed to be paid.

“Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales?

“A. Yes.

“Q. For the period 1947, 1948 and 1949 down to October 19th?

“A. Yes.

“Q. Now during your cross examination you were asked whether or not you made any demands upon the plaintiff with reference to the percentage claimed due on wholesale sales and I believe you said you had made no such demand?

“A. For a fixed figure.

“Q. That is right?

“A. No.

“Q. And why was no such demand made?

"A. Because we had no way of fixing a figure. We made demands but not for a fixed figure."

The appellee at no time demanded or requested any fixed figure because it was not in any position to do so. The figure of \$5,161.60 was furnished by appellant and agreed to by both parties as the amount appellant was willing to pay and defendant was willing to accept.

*I. Conclusions.*

For the reasons hereinabove set forth, it is respectfully submitted that the judgment and decree, in so far as the appeal of Gamble-Skogmo, Inc. is concerned, should be affirmed, and the appeal dismissed.

Respectfully submitted,

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Service admitted this.....day of September, 1951.

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